(1)

No. 90-8370-CSY
Status: GRANTED
CAPITAL CASE

Title: Teofilo Medina, Jr., Petitioner
v.
California

Docketed:
June 14, 1991

Court: Supreme Court of California

Counsel for petitioner: Pescetta,Michael

See also:
90-8437
90-8475

Counsel for respondent: Wilkens,Holly

Entry	Date	Note	Proceedings and Orders
1	May 3 1991	G	Application (A90-825) to extend the time to file a petition for a writ of certiorari from May 15, 1991 to June 29, 1991, submitted to Justice O'Connor.
2	May 6 1991		Application (A90-825) granted by Justice O'Connor extending the time to file until June 14, 1991.
3	Jun 14 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
5	Jul 16 1991		Brief of respondent California in opposition filed.
6	Jul 25 1991		DISTRIBUTED. September 30, 1991
8	Oct 7 1991		REDISTRIBUTED. October 11, 1991
10	Oct 15 1991		REDISTRIBUTED. October 18, 1991
12	Oct 21 1991		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
13	Oct 31 1991	G	Motion of petitioner for appointment of counsel filed.
15	Nov 7 1991		Record filed.
		*	Original record, Supreme Court of California, 8 Volumes,(2 Boxes)
14	Nov 12 1991		Motion for appointment of counsel GRANTED and it is ordered that Michael Pescetta, Esquire, of San Francisco, California, is appointed to serve as counsel for the petitioner in this case.
16	Nov 25 1991		Joint appendix filed.
18	Dec 4 1991	G	Motion of Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York for leave to file a brief as amicus curiae filed.
17	Dec 6 1991		Brief of petitioner Medina (TO BE PRINTED) filed.
20	Dec 6 1991		Brief of petitioner Medina filed.
19	Jan 2 1992		SET FOR ARGUMENT TUESDAY, FEBRUARY 25, 1992. (2ND CASE)
22	Jan 2 1992		Brief of respondent California filed.
23	Jan 2 1992		Brief of respondent California filed.
21	Jan 6 1992		Brief amicus curiae of United States filed.
24	Jan 6 1992		Brief amicus curiae of Criminal Justice Legal Foundation filed.
25	Jan 27 1992		Motion of Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York for leave to file a brief as amicus curiae GRANTED.
26	Jan 28 1992		CIRCULATED.
27	Feb 4 1992	X	Reply brief of petitioner Medina filed.
28	Feb 25 1992		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(2)

ORIGINAL

No. 90-8370

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TEOFILO MEDINA, JR., Petitioner,

v.

THE STATE OF CALIFORNIA, Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner TEOFILO MEDINA, JR., asks leave to file the accompanying petition for writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed before the California Supreme Court. Petitioner's declaration in support of this motion is attached hereto.

DATED: June 14, 1991

Respectfully submitted,

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

MICHAEL PESCETTA
Deputy State Public Defender

Counsel for Petitioner

90 PP

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TEOFILO MEDINA, JR., Petitioner,

vs.

THE STATE OF CALIFORNIA, Respondent.

DECLARATION IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, TEOFILO MEDINA, JR., declare under penalty of perjury that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs or give security therefor, I state that becuase of my poverty I am unable to pay the costs of said proceeding or give security therefor, and that I believe I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of proceeding in this Court are true:

///

///

///

1. Are you presently employed? Yes ___ No X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

NO EMPLOYMENT SINCE 1976

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ___ No X
   a. If the answer is yes, describe the source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes X No ___
   a. If the answer is yes, state the total value of the items owned.

APPROX. $80

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ___ No X
   a. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

///

///

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I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury. This declaration was executed on the 28th day of May, 1991, at San Quentin, California.

TEOFILO MEDINA, JR.

///

///

///

STATE OF CALIFORNIA

PETE WILSON, Governor

OFFICE OF THE STATE PUBLIC DEFENDER
221 MAIN STREET, TENTH FLOOR
SAN FRANCISCO, CA 94105
(415) 904-5600
FAX (415) 904-5635

June 14, 1991

RECEIVED
JUN 17 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: Medina v. California

Dear Mr. Suter:

Enclosed are the required number of copies of a petition for writ of certiorari, a motion to proceed in forma pauperis, and certificate of service, in the above-entitled matter, which are due to be filed on June 14, 1991. An affidavit of mailing on that date will follow under separate cover. See Supreme Court Rule 29.2. Please return the copies for file-stamping in the enclosed envelope.

Thank you for you assistance.

Yours truly,

MICHAEL PESCETTA
Director of Capital Litigation

MP:vb

Enclosures

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

TEOFILO MEDINA, JR., Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

CERTIFICATE OF SERVICE

I, MICHAEL PESCETTA, declare that I am over the age of 18 years, not a party to the within cause and a member of the bar of this Court; my business address is 221 Main Street, Tenth Floor, San Francisco, CA 94105. I served a true copy of the accompanying:

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA; MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on each of the following, by placing same in an envelope addressed as follows:

DANIEL LUNGREN
Attorney General of the
State of California
110 West A Street, Suite 700
San Diego, CA 92101
Attn: Holly Wilkinson
Deputy Attorney General

Each said envelope was then, on June 14, 1991, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 1991, at San Francisco, California.

MICHAEL PESCETTA

ORIGINAL

No. 90-8370

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TEOFILO MEDINA, JR., Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Supreme Court, U.S.
FILED
JUN 14 1991
OFFICE OF THE CLERK

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State Public Defender

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221 Main Street, 10th Floor
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Attorneys for Petitioner

QUESTIONS PRESENTED

1. After a doubt has been declared by a trial court as to the competency of a criminal defendant to be tried, can a state, consistent with due process of law, place the burden of proving incompetency upon the defendant whose competency is in issue, and impose a presumption that the defendant is competent, at the same time as it denies the defendant the right to invoke or waive constitutional rights in the proceeding to determine competency, on the ground that the defendant is incompetent to exercise them.

2. Whether, under the Eighth and Fourteenth Amendments, the state may introduce evidence of previously unadjudicated criminal activity against a defendant at the penalty phase of a capital trial.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

TEOFILO MEDINA, JR., Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Petitioner TEOFILO MEDINA, JR. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of California affirming his conviction and sentence of death.1/

OPINIONS BELOW

The opinion of the California Supreme Court is published as People v. Medina, 51 Cal.3d 870 (1990). Appendix at 1-53. The order denying petitioner's timely petition for rehearing is unpublished. Appendix at 55.

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1/ There are no parties to this proceeding other than those stated in the caption.

JURISDICTION

The judgment of the California Supreme Court affirming petitioner's death sentence was entered on November 19, 1990. A timely petition for rehearing was denied on February 14, 1991. On motion of petitioner, Justice O'Connor entered an order on May 6, 1991, extending the time for the filing of this petition until June 14, 1991. Application No. A-825.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL AUTHORITIES INVOLVED

The Eighth Amendment to the United States Constitution provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code section 1369 provides, in pertinent part:

> "A trial by court or jury of the question of mental competence shall proceed in the following order:
>
> * * * *
>
> "(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous"

STATEMENT OF THE CASE

Petitioner Medina was convicted of three murders with special circumstances, Cal. Pen. Code, §§ 187, 190.2, subd. (a)(17)(i and vii), (a)(3), and of other offenses, and sentenced to death. CT 1346.2/

Before trial, on motion of the defense, the trial court declared a doubt as to the defendant's competence to stand trial, suspended the criminal proceedings, and instituted proceedings under California Penal Code section 1368 to try the issue of competence to a jury. CT 419. At this proceeding, Dr. William Gold, a psychiatrist who had treated the petitioner, over a period of two years when he was in prison testified that he is a paranoid schizophrenic who was not capable of assisting his attorneys. RT 431-432, 456, 471-472. Gold believed that his lack of memory of the charges was consistent with his diagnosis. RT 480.

Dr. David Echeandia, a clinical psychologist, testified that petitioner might be schizophrenic and did have an antisocial personality disorder but was not paranoid schizophrenic. Petitioner had been in the jail restraint room, which was for violent people who were out of contact with reality. RT 329,

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2/ CT and RT refer to the clerk's and reporter's transcripts in the automatic appeal in the California Supreme Court.

332, 339, 344, 496. Echeandia could not say whether he was competent. RT 500.

Dr. Kaushal Sharma, a psychiatrist, concluded that the "scale" was on the side of petitioner's competency, but conceded that Dr. Gold was in a better position to make a diagnosis. RT 521, 542. Sharma did not believe that he was a paranoid schizophrenic or that his memory was impaired. Sharma believed petitioner had a motive to malinger, RT 533, 548, and that his care of his personal hygiene indicated that he was not mentally disturbed. RT 547. Sharma believed it was "possible" that petitioner had no control over his failure to cooperate with his attorneys, but Sharma's opinion was that petitioner could cooperate. RT 512, 539.

Dr. David Pierce, a psychologist, believed petitioner was schizophrenic and delusional and did have impaired memory. RT 602, 606-607, 614, 619. His history of violence and his hallucinations were consistent with schizophrenia, and Pierce did not believe he was malingering. RT 610, 614-617. Pierce nonetheless believed that petitioner was competent to stand trial. RT 620.

Dr. George Sakurai, a jail psychiatrist, testified that petitioner was on medication for depression and often had to be put into a restraint room before going to court. RT 232-233. He had a suicide wish and had cut himself, although Sakurai did not have an opinion as to how serious his suicide attempts were. RT 229, 236, 256. Sakurai thought petitioner's most serious problem

was depression, but that he was malingering and manipulative and was able to stand trial. RT 257, 721-722.

Petitioner's former parole officer testified that he had never acted "bizarre" during interviews two years before the competency proceeding. RT 665. A jailer testified that petitioner had "rational" conversations with him. RT 686-687.

Petitioner's sister, Sylvia Ayala, testified that he was "like two persons" and "made no sense" when he lived with her just before his arrest. RT 270, 279, 281. The defense investigator testified that he had seen petitioner over twenty times and had never been able to have a relevant conversation about the charges. RT 754-755.

At the close of the competency proceeding, the trial court instructed the jury in the terms of CALJIC No. 4.10 (1984 rev.) which imposes the burden of proof on the defendant to show incompetence and which imposes a presumption of the defendant's competence. Cal. Pen. Code § 1369 subd. (f); CT 419; RT 902. In closing argument, the prosecutor emphasized the defendant's burden of proof, arguing that the defendant had to be a "vegetable" to be shown incompetent. RT 826, 829-830, 865.

At the penalty phase of trial, the prosecution relied on evidence of alleged unadjudicated criminal acts as factors in aggravation. Cal. Pen. Code § 190.3, subd. (b).3/ This

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3/ Some of this evidence, presented to show an alleged rape, was admitted in the sanity phase of trial. The penalty jury was instructed it could consider evidence introduced in the previous phases of trial.

evidence included testimony to show that petitioner had committed another murder in 1984, RT 7122, 7135-7137, 7158, 7173-7180; that he had committed a rape in 1984, RT 6836-6841, 6849-6850, 6853-6863; that he had committed an assault while he was in the Arizona State Prison in 1979, RT 7111-7118; and that he had committed an assault in a bar in 1975, RT 7096-7103. The penalty jury was instructed that it could consider these alleged instances of commission of other offenses as factors in aggravation of the penalty if it found them true beyond a reasonable doubt.

RAISING AND DISPOSITION OF THE ISSUES IN THE PROCEEDINGS BELOW

At the competency proceedings, the trial court instructed the jury in terms of CALJIC No. 4.10 (1984 Rev.), which, based on Penal Code section 1369, subdivision (f), places the burden of proving incompetency upon the defendant and imposes a presumption of competence. CT 419; RT 902. On appeal, the defense argued that the rule stated by the instruction was inconsistent with the due process clause of the Fourteenth Amendment to the federal constitution, and the California Supreme Court rejected the argument on the merits. See Cal. Pen. Code, § 1259 (instructional errors reviewable on appeal without objection at trial). Two justices of the California Supreme Court dissented on the ground that placing the burden of proving incompetency on the defendant is unconstitutional under the due process clause. 51 Cal.3d at 881-885, 913, 914.

In the trial court, the defense moved to impanel a separate jury to try the allegations of unadjudicated misconduct before they were submitted to the penalty jury, and the trial court denied the motion. RT 5907, 5929. The penalty jury was instructed to consider the misconduct in aggravation if it found the allegations true, in the terms of CALJIC No. 8.84.2.1. CT 1187. On appeal, the defense argued that the submission of the allegations of unadjudicated misconduct to the same jury which had determined guilt and would determine penalty violated the defendant's right to due process and equal protection under the Fourteenth Amendment, and to a constitutionally reliable sentence under the Eighth Amendment. The California Supreme Court rejected these arguments on the merits. 51 Cal.3d at 906-907.

REASONS FOR GRANTING THE PETITION

1. In ruling that a defendant whose competence to stand trial is in doubt could be compelled to shoulder the burden of proof as to his own incompetence, the California Supreme Court rejected a line of well-reasoned decisions of other state courts and of federal courts of appeals which follow and apply the principles of this Court's decision in Pate v. Robinson, 383 U.S. 375 (1966) and its progeny, and conclude that this placement of the burden of proof violates due process. Instead, over the dissents of two justices, the California court, in upholding the statutory placement of the burden of proof, embraced a minority line of cases, which does not adequately analyze the issues

arising from placing a burden of proof upon an apparently incompetent party, and which relies upon a misapplication of this Court's decision in Leland v. Oregon, 343 U.S. 790 (1952) and its progeny. Review on certiorari is necessary to confine the application of Leland to its proper scope and to resolve the conflict in the decisions of the courts of appeals and of the highest courts of several states on the issue.

There can be no dispute that "the conviction of an accused person when he is legally incompetent violates due process . . . and that state procedures must be adequate to protect that right." Pate v. Robinson, 383 U.S. at 387 (citation omitted); Drope v. Missouri, 420 U.S. 162, 171-172 (1975); Dusky v. United States, 362 U.S. 402 (1960).

Pate did not specify a burden of proof in the proceeding to determine the defendant's competency, although some early caselaw, cited in Drope v. Missouri, supra, 420 U.S. at 172, suggests that the proper rule was that a defendant could not be tried if there was a reasonable doubt as to competency. See Youtsey v. United States, 97 F. 437, 940-946 (6th Cir. 1899); United States v. Chisolm, 149 F. 284, 289 (C.C.S.D. Ala. 1906); United States v. Lancaster, 26 Fed.Cas. 852, 854 (C.C.N.D. Ill. 1877) (No. 15,555). In Drope, this Court indicated that the Illinois procedure reviewed in Pate, "if followed, was constitutionally adequate." Drope v. Missouri, supra, 420 U.S. at 172 (citation omitted). Illinois law requires the prosecution to bear the burden of proof of the defendant's competence.

People v. Bender, 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960). The question whether a state statute can constitutionally place the burden of proving incompetence upon the defendant, after a doubt has arisen as to that defendant's competence, is, we submit, implicitly answered by the principles that form the basis of the decision in Pate; but there is a conflict of authority among the federal courts of appeals, and among the highest state courts, on the issue.

One line of cases--including the clear majority of cases--follows the practical analysis of waiver in Pate. There, this Court rejected an argument that a defendant could waive the right to a competency hearing because it would be "contradictory" to allow a defendant who may be incapable of standing trial to waive the right to have that issue determined. Pate v. Robinson, supra, 383 U.S. at 384; see also Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960). In a leading case on this issue, the Court of Appeals for the Third Circuit recognized that "[i]t is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." United States v. DiGilio, 538 F.2d 988, 972 (3d Cir. 1976). This conclusion is simple common sense, and it forms the analytical basis for the authorities which hold, under the due process guarantees of the federal or state constitutions, that placing the burden of proof of incompetency on the defendant is constitutionally

impermissible. United States ex rel. Bilyew v. Franzen, 686 F.2d 1238, 1244-1245 (7th Cir. 1982); Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348, 351-354 (2d Cir. 1982); People v. McCullum, 362 N.E.2d 307, 310-311 (Ill. 1977); State v. Jones, 406 N.W.2d 366, 367-370 (S.D. 1987); State v. Bertrand, 465 A.2d 912, 916-197 (N.H. 1983); Diaz v. State, 508 A.2d 861, 863-864 (Del. 1986); State v. Heger, 326 N.W.2d 855, 857-858 (N.D. 1982); Commonwealth v. Crowley, 471 N.E.2d 353, 357-358 (Mass. 1984); Jolley v. State, 384 A.2d 91, 98 (Md. 1978); see also United States v. Makris, 535 F.2d 899, 905-906 (5th Cir. 1976).

With respect to the general issue of placement of burdens of proof, the DiGilio line of cases also follows this Court's jurisprudence which recognizes that the placement of the burden of proof in any proceeding involves important constitutional values: "the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." Santosky v. Kramer, 455 U.S. 745, 755 (1982); Addington v. Texas, 441 U.S. 418, 423-425 (1979). The importance which this Court's decisions place on the defendant's personal ability to participate in the trial and to assist (and be assisted and advised by) counsel, precludes a rule which would place the risk of an erroneous determination on the defendant. In terms of the strength of the respective parties' interests, an

error is far more dangerous to the defendant: trial of an incompetent defendant may result in wrongful conviction or even an unreliable death sentence, and infects all subsequent legal proceedings; but an erroneous finding of incompetency, resulting in the defendant's institutionalization, merely postpones the criminal proceedings until a determination is made that the defendant is, in fact, competent. To the extent that the evidence may be equally balanced, any risk of error must be borne by the state, because an affirmative finding of competence, required by Pate, cannot be made.

> "What we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the [Supreme] Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, see Drope v. Missouri, supra, 420 U.S. at 171-172, 95 S.Ct. 896, the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant." United States v. DiGilio, supra, 538 F.2d at 988 (footnote omitted).

In contrast to the analysis of these cases, the minority line of cases does not come to grips with the basic problem of placing the burden of proof on the party whose mental state has raised a doubt as to his competency to stand trial. Lowenfield v. Phelps, 817 F.2d 285, 294-295 (5th Cir. 1987), aff'd on other grounds, 484 U.S. 231 (1988); State v. Chapman, 104 N.M. 324, 721 P.2d 392, 395 (1986); Wallace v. State, 248 Ga. 255, 282, S.E.2d 325, 330 (1981); State v. Aumann, 265 N.W.2d 316, 319-320 (Iowa 1978); State v. Rogers, 419 S.2d 840, 843 (La.

1982); See State v. Pruitt, 480 N.E.2d 499, 509 (Ohio App. 1984) (Markus, J., concurring); id. (Nahara, J., concurring). Instead, these cases, to the extent that they analyze the question at all, generally cite the decision in Leland v. Oregon, 343 U.S. 790, 798-799 (1952), as a warrant for concluding that the burden of proof can be placed on the defendant. See People v. Medina, supra, 51 Cal.3d at 883-884; Lowenfield v. Phelps, supra, 817 F.2d at 294; State v. Pruitt, 480 N.E.2d 509 (Markus, J., concurring).

As jurists and commentators have pointed out, however, the situations involved are entirely different. In Leland and other cases involving affirmative defenses, the question is whether a presently-competent defendant can constitutionally be required to carry the burden of proof as to an affirmative defense existing at the time of the offense. Here, the question is whether a defendant whose competence is already in doubt can be required to carry the burden of proof of demonstrating the disability under which he is laboring during the proceeding to determine that very issue. See People v. Medina, supra, 51 Cal.3d at 917-918 (Broussard, J., dissenting); State v. Bertrand, supra, 465 A.2d at 916; Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454 (1967).

The irrationality of the California statute, and the Supreme Court's decision upholding it, is demonstrated by the recognition that, in practice, the California procedure does not treat the defendant as competent once a doubt as to competence

has arisen. Once the court has declared a doubt as to the defendant's competence, neither the defendant nor counsel can withdraw the motion raising the issue of competence or waive hearing on it: only an actual finding on the issue permits the criminal proceedings to be resumed. California law also severely restricts the defendant's power to make decisions in the proceeding: the defendant cannot forbid counsel to move for a competency examination, cannot exercise the attorney-client privilege to prevent testimony as to confidential communications, cannot invoke the privilege against self-incrimination to prevent testimony as to his own statements made in the course of the competency examinations and cannot control the litigation on his own behalf. E.g., People v. Marks, 45 Cal.3d 1334, 1340-1342, 248 Cal.Rptr. 874, 756 P.2d 260 (1988); People v. Samuel, 29 Cal.3d 489, 495-496, 174 Cal.Rptr. 684, 629 P.2d 485 (1981); Shephard v. Superior Court, 180 Cal.App.3d 23, 30-31, 225 Cal.Rptr. 328 (1986); Tarantino v. Superior Court, 48 Cal.App.3d 465, 469, 122 Cal.Rptr. 61 (1975). These principles are also reflected in federal law. See, e.g., Estelle v. Smith, 451 U.S. 454, 465 (1981) (no Fifth Amendment privilege in examination to determine competency to stand trial); Seidner v. United States, 260 F.2d 732, 734 (D.C. Cir. 1958).

In short, state law treats the defendant in the competency proceeding as if he is incompetent. A fortiori, it is irrational to impose a presumption of competence in the context of that proceeding, and to impose upon the defendant the burden

of showing that he is not competent, rather than placing upon the state the burden of showing that the competency standard of Pate v. Robinson has in fact been met in the defendant's case.

The California Supreme Court's decision in this case cannot be reconciled with the concern for fundamental fairness expressed in Pate and other decisions of this Court. The state courts and the federal courts of appeals are in disarray on the issue of the burden of proof which is constitutionally mandated, and "the degree of proof required in a particular type of proceeding 'is the kind of question which as traditionally been left to the judiciary to resolve.'" Santosky v. Kramer, supra, 455 U.S. at 755-756, quoting Woodby v. INS, 385 U.S. 276, 284 (1966). This Court should grant certiorari to resolve the issue. See Supreme Court Rule 10.1(a).

2. At the penalty phase of petitioner's trial, the state relied on evidence of previously unadjudicated criminal acts allegedly committed by petitioner to establish aggravating factors. Cal. Pen. Code, § 190.3, subd. (b). These acts included the alleged robbery and murder of Craig Martin in 1984, the alleged rape in 1984 of Karen Whitacre; the alleged assault on an inmate named Hillyer in the Arizona State Prison in 1979, and the alleged assault on a Mr. Sanchez in a bar in 1975. At the time of the penalty phase, petitioner had not been convicted of a crime in connection with any of these acts. In fact, petitioner was never charged with any crime in the incidents involving Hillyer and Sanchez, and the charges involving Whitacre

had been dismissed twice, thereby barring further prosecution. Cal. Pen. Code, § 1387. The use of such evidence of unadjudicated crimes in the penalty phase of a capital trial violates due process and equal protection and offends the Eighth Amendment requirement of heightened reliability in death cases.

Because a penalty of death is qualitatively different from a sentence of imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plur. opn. of Stewart, Powell, and Stevens, JJ.); Caldwell v. Mississippi, 472 U.S. 320, 340 (1985). This Court has previously invalidated death sentences when it was "found that the circumstances under which they were imposed 'created an unacceptable risk that "the death penalty [may have been] meted out arbitrarily or capriciously" or through "whim . . . or mistake."'" Turner v. Murray, 476 U.S. 28, 35-36 (1986), quoting Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring). Indeed, this Court specifically requires that the criteria used to select death over life in a capital sentencing proceeding must be reliable and non-arbitrary. Gardner v. Florida, 430 U.S. 349, 359, 361 (1977); Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Permitting evidence of alleged criminal acts at a capital sentencing trial without affording the accused the same constitutional protections required in other criminal proceedings

is antithetical to the heightened need for reliability in capital cases, and therefore violates the Eighth and Fourteen Amendments.

The use of unadjudicated criminal activity to impose a death sentence violates the constitutional presumption of innocence. In Johnson v. Mississippi, 486 U.S. 578, 585-586 (1988), this Court held that a vacated conviction could not be the basis of eligibility for a death sentence. The reasoning in Johnson applies with equal, if not greater, force to the use of unadjudicated crimes in the penalty phase of a capital trial. Indeed, it is fundamental to our system of justice that an individual should not be punished for a crime the state has failed to prove. See Cole v. Arkansas, 333 U.S. 196, 201 (1948).

California's requirement that the jury find that the defendant committed the unadjudicated offense beyond a reasonable doubt before considering it in aggravation, see People v. Balderas 41 Cal.3d 144, 204-205, 222 Cal.Rptr. 184, 711 P.2d 480 (1985), does not ameliorate the unreliability of such evidence. The penalty jury in this case already knew petitioner had been convicted of three aggravated first degree murders. It violates both fundamental fairness and the right to a trial before an impartial jury to impose upon a criminal defendant the burden of defending against new charges of criminal activity at the sentencing trial.

Furthermore, California law does not require a penalty phase jury to agree unanimously that the unadjudicated crime has been properly proven. People v. Miranda, 44 Cal.3d 57, 99, 241

Cal.Rptr. 594, 744 P.2d 1127 (1987). An individual juror who believes the unadjudicated conduct has been proven beyond a reasonable doubt may vote to impose the death penalty based on evidence rejected by eleven other jurors. The absence of a unanimity requirement therefore exacerbates the possibility that evidence of unadjudicated acts will encourage jurors to sentence capital defendants to death, thus heightening the unreliability of the unadjudicated crimes evidence.

The use of unadjudicated misconduct evidence deprives a capital defendant of equal protection because he does not receive the benefits of an impartial and unanimous jury nor the right to an adequate defense and to an appeal, as he would were he a defendant charged with prior offenses which had been reduced to valid convictions. By arbitrarily depriving capital defendants of the protection of state law requirements for rebutting the presumption of innocence, see Johnson v. Mississippi, supra, 486 U.S. at 585. California's rule permitting the use of unadjudicated misconduct evidence deprives capital defendants of due process of law, and equal protection of the laws, under the federal constitution. Evitts v. Lucey, 469 U.S. 387, 401-406 (1985); Hicks v. Oklahoma, 447 U.S. 343, 364-377 (1980). The use of such evidence also results in a situation where no jury could be expected to follow the court's instruction to disregard evidence in aggravation which is not found to be true beyond a reasonable doubt. See, e.g., Bruton v. United States, 391 U.S. 123, 129 (1968). Furthermore, the state's reliance on such

inherently prejudicial evidence diverts the jury's attention from its principal task of arriving at a reliable penalty determination.

Finally, as Justice Marshall has noted in his dissents from denial of certiorari in Miranda v. California, 486 U.S. 1038 (1988); Devier v. Kemp, 484 U.S. 948 (1987) and Williams v. Lynaugh, 484 U.S. 935 (1987), state courts are in disarray on the question of admitting evidence of unadjudicated criminal activity during the penalty phase of a capital trial. While a number of states allow such evidence, see Milton v. State, 599 S.W.2d 824 (Tex.Crim.App. 1980) (en banc), cert. denied 451 U.S. 1031; Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. den. 449 U.S. 986, 449 U.S. 1104; Miller v. State, 280 Ark. 551, 660 S.W.2d 163 (1983); Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987), at least six states prohibit evidence of unadjudicated crimes, concluding that its introduction violates due process. See State v. Bobo, 727 S.W.2d 945 (Tenn. 1987), cert. denied 484 U.S. 872 (1987); State v. Bartholomew, 98 Wash.2d 173, 654 P.2d 1170 (1982), remanded, 463 U.S. 1203 (1983), opinion after remand, 101 Wash.2d 631, 683 P.2d 1079 (1984); State v. McCormick, 272 Ind. 272, 397 N.E.2d 276 (1979); Cook v. State, 369 So.2d 1251 (Ala. 1979); Commonwealth v. Hoss, 445 Pa. 98, 283 A.2d 58 (1971); Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied 431 U.S. 969 (1977). Additionally, at least one Circuit Court of Appeals has questioned the constitutionality of using unadjudicated crimes evidence. See Landry v. Lynaugh, 844 F.2d

1117 (5th Cir. 1988) (use of uncharged crimes "may present due process [and] equal protection problems"). The conflict among the states over such a fundamental matter in capital cases requires the attention of this Court. Therefore, a writ of certiorari should issue and the Court should decide whether the use of unadjudicated criminal activity during the penalty phase of a capital trial violates due process, equal protection, and the requirement of heightened reliability in capital cases.

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CONCLUSION

For the reasons stated above, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of California.

Dated: June 14, 1991

Respectfully submitted,

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MP:vb

APPENDIX

[No. S004758. Nov. 19, 1990.]

THE PEOPLE, Plaintiff and Respondent, v.
TEOFILO MEDINA, JR., Defendant and Appellant.

SUMMARY

Defendant was sentenced to death following his conviction of three counts of first degree murder (Pen. Code, § 187) accompanied by three special circumstance findings of robbery-murder (Pen. Code, § 190.2, subd. (a)(17)(i)), burglary-murder (Pen. Code, § 190.2, subd. (a)(17)(vii)), and multiple murder (Pen. Code, § 190.2, subd. (a)(3)). The jury found that the three murders were premeditated and deliberate, and that defendant was sane at the time of the offenses. At a pretrial competency hearing (Pen. Code, § 1369), the jury found defendant competent to stand trial. (Superior Court of Orange County, No. C-36201, James K. Turner, Judge.)

The Supreme Court affirmed the judgment in its entirety. The court rejected defendant's contention that Pen. Code, § 1369, by placing the burden on him to prove his incompetence to stand trial, was unconstitutional as a denial of due process, holding that § 1369, passes constitutional muster under both the federal and state Constitutions. The court also held the trial court did not err in failing to discharge the entire jury venire after learning that some prospective jurors indicated they were biased against defendant. It also held the trial court did not err in applying the adoptive admissions rule to evidence of a conversation defendant had with his sister in jail. The court also rejected guilt phase claims of error respecting police failure to preserve certain fingerprint evidence, prosecutorial misconduct in an attack on defendant's fingerprint expert and comment on defendant's courtroom behavior, and issues concerning the shackling of defendant due to his violent behavior. The court also held the trial court did not err in granting defendant's free and voluntary decision to reinstate his previously withdrawn insanity plea. It further held no prejudice resulted from defendant's voluntary absence from in-chambers conferences and the reading to the jury of certain testimony.

As to penalty phase contention, the court held defendant was not prejudiced by testimony that the victims were friendly, nonaggressive persons who would not have resisted a robbery attempt, that evidence of prior

unadjudicated crimes was properly admitted as aggravating factors, and that the trial court adequately instructed the jury on mental or emotional disturbance as a mitigating factor. It further held the trial court's consideration of victim impact and character evidence in connection with the automatic modification motion was not improper and did not require a remand for a new hearing. (Opinion by Lucas, C. J., with Panelli, Eagleson, Kennard and Arabian, JJ., concurring. Separate dissenting opinions by Mosk and Broussard, JJ.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) **Criminal Law § 211—Trial—Proceedings on Issue of Insanity—At Time of Trial—Burden of Proof—Constitutionality.**—Pen. Code, § 1369, in placing the burden on a criminal defendant to prove his incompetence to stand trial, did not deny a defendant due process of law under the state and federal Constitutions in a capital murder prosecution. That policy does not violate generally accepted concepts of basic standards of justice. A defendant's competence to stand trial bears only on his mental state and is not an element of the crime charged, for which the prosecution bears the burden of proof. Due process generally allows shifting to the defendant the burden of proving his affirmative defenses, and that principle applied to defendant's present sanity, since defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry. Neither is the presumption of competence in § 1369 improper, even after a doubt arises regarding defendant's competence; by its terms, the presumption of competence is one which affects the burden of proof, and accordingly remains in effect despite the introduction of some evidence of incompetence.

[Modern status of rules as to burden and sufficiency of proof of mental responsibility in criminal cases, note, 17 A.L.R.3d 146. See also Cal.Jur.3d (Rev), Criminal Law, § 2890; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2990.]

(2) **Criminal Law § 211—Proceedings on Issue of Insanity—At Time of Trial—Due Process.**—The conviction of an accused while he is legally incompetent violates due process, as does the failure of the trial court to employ procedures to protect against trial of an incompetent defendant. A competency hearing is required whenever substantial evidence of the accused's competence has been introduced.

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(3) **Criminal Law § 405—Admissibility—Opinion Evidence—Competency Hearing—Deputy Sheriff.**—In Pen. Code, § 1369, proceedings to determine defendant's competency to stand trial in a capital murder prosecution, the trial court did not err in permitting a deputy sheriff to testify regarding defendant's mental state and degree of awareness while in jail. In light of the discretion vested in the trial court to permit lay opinion testimony, the nature of the other evidence admitted at the competency hearing, and the rather limited responses elicited from the deputy, there was no error.

(4) **Criminal Law § 457—Prosecutor—Closing Argument—Comment on Prior Charges or Convictions—Competency Hearing.**—In a competency hearing (Pen. Code, § 1369) in a capital murder prosecution, the prosecutor did not commit misconduct in presenting evidence and argument regarding defendant's prior criminal acts and convictions, where the prosecutor simply outlined the competency hearing testimony, and the facts on which that testimony was based, including occasional references to defendant's prior acts and convictions. Throughout his argument the prosecutor explained to the jurors that his comments were not evidence, that the sole issue then before them was defendant's competence, and not his guilt of any crimes, and that any evidence of such crimes was introduced for the sole purpose of determining the competency issue.

(5) **Jury § 32—Challenges—To Panel—Bias—Discharge.**—In a capital murder prosecution, the trial court did not err in failing to discharge the entire jury venire after learning that some prospective jurors indicated they were biased against defendant. None of the prospective jurors indicated during the bias hearing actually served on the jury, and each person selected for the jury affirmed his or her ability to be fair and impartial. The trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required, and such a drastic remedy is not appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks.

(6a, 6b) **Criminal Law § 393—Evidence—Admissibility—Admissions and Declarations—Silence During Interrogation—Adoptive Admission Rule—Conversation With Sister.**—In a capital murder prosecution, the application of the adoptive admissions rule to a conversation between the defendant and his sister in jail did not violate defendant's self incrimination and due process rights. Even assuming that warnings as to defendant's right to remain silent were given, it was

reasonable under the circumstances to permit the jury to draw an adverse inference from defendant's silence in response to his sister's inquiry as to why he shot the victims. There was no suggestion defendant believed this conversation was being monitored, or that his silence was intended as an invocation of any constitutional right. There is no valid constitutional objection to the application of the adoptive admissions rule in cases where the defendant reasonably could be expected to respond to, and deny, the accusatory statement.

[Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, note, 87 A.L.R.3d 706.]

(7) **Criminal Law § 411—Evidence—Hearsay—Nonassertive Conduct—Adoptive Admissions Rule.**—To warrant admissibility of a conversation under the adoptive admissions rule, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.

(8) **Criminal Law § 109—Competence of Defense Counsel—Acts or Omissions.**—In a capital murder prosecution defendant failed to show his defense counsel was incompetent by failing to pursue further inquiry, other than an objection, concerning whether defendants' sister was acting as a police agent during a conversation admitted as an adoptive admission. It was entirely possible counsel tactically declined to pursue the matter, doubting he could establish that the sister was an agent of the government and acting against defendant's best interest. Moreover, defendant failed to show a reasonable probability that, but for counsel's omissions, the verdict would have been different, or that further inquiry would have established the sister's status as a police agent such that defendant's adoptive admission would have been excluded.

(9) **Criminal Law § 45.2—Rights of Accused—Fair Trial—Failure to Preserve Evidence—Sua Sponte Instruction.**—In a capital murder prosecution, the trial court did not err in failing to instruct the jury sua sponte that because of a police officer's negligent failure to preserve a bottle at a crime scene from which a fingerprint was taken, the jury should draw any conflicting inferences regarding the prints in favor of defendant, and that the prosecution's fingerprint evidence should be viewed with "distrust." Although the trial court has discretion to impose appropriate sanctions, including fashioning a suitable

cautionary instruction when a defendant has proved a loss of material evidence, there is no requirement that the instructions proposed by defendant are required to be given sua sponte.

(10) **Criminal Law § 454—Prosecutor—Closing Argument—Comment on Witnesses.**—In a capital murder prosecution, any misconduct by the prosecutor in accusing defendant's fingerprint expert of "prostituting" the judicial system, of "selling out," and being motivated solely by greed and being dishonest, was waived by defendant's failure to object to the comments or seek an appropriate admonition. A timely objection and admonition by the court at the outset might have tempered the prosecutor's aggressiveness before it became so extreme.

(11) **Criminal Law § 455—Prosecutor—Closing Argument—Comment on Defendant's Failure to Testify—Demeanor.**—In a capital murder prosecution, any misconduct by the prosecutor construed as commenting on the "demeanor" of defendant, who did not testify, was harmless in view of defendant's failure to object to the comment or seek an admonition and where the brief comment on defendant's laughter was minor, the jury not being asked to draw any adverse inferences of guilt from defendant's conduct. Although subsequent remarks were more serious, touching on the prosecutor's theme of defendant's cowardice and cruelty, any misconduct there was also harmless, since the prosecutor was simply reacting spontaneously to defendant's gratuitous interruption of the proceedings, rather than commenting reflectively on his demeanor. The evidence of defendant's guilt was substantial, and no defense was offered other than an attempt to dispute fingerprint evidence tying him to one of three murders.

(12) **Criminal Law § 44—Rights of Accused—Fair Trial—Physical Restraints on Defendant.**—In a capital murder prosecution, the trial court did not abuse its discretion in ordering defendant shackled during the remainder of the trial after he had cried out during competency phase testimony, stood up and turned over the counsel table. Defendant was muscular, weighed over two hundred and thirty pounds, was around six feet three inches tall, and had a prior record and history of violence, including a long list of disturbances while in custody.

(13) **Criminal Law § 677.2—Appellate Review—Harmless Error—Instructions—Failure or Refusal to Give—Shackles on Defendant.**—In a capital murder prosecution, any error by the trial court in failing to instruct sua sponte that restraints placed on defendant should have no bearing on a determination of his guilt was harmless, where defendant did not testify and the failure to admonish the jury was unaccompanied by other substantial errors.

(14) **Criminal Law § 45—Rights of Accused—Fair Trial—Distortion or Suppression of Evidence—Display of Mannequins.**—In a capital murder prosecution the trial court did not err in allowing the prosecutor to display three life-size mannequins with rods sticking through them to show the bullet trajectories as to the three murder victims. The trial court carefully exercised its discretion in the matter with a view toward accommodating the respective interests of both parties, and although it reasonably could have excluded the mannequins from the jury room, there was no abuse of discretion in the contrary ruling.

(15) **Criminal Law § 162—Plea—Not Guilty—Reason of Insanity—Withdrawal and Reinstatement.**—In a capital murder prosecution the trial court did not err in accepting defendant's free and voluntary decision to reinstate his previously withdrawn insanity plea. A defendant cannot be compelled by counsel to abandon an insanity defense merely because counsel disagrees with the tactics of that decision. The trial court had no discretion to deny defendant's motion to reinstate his insanity plea solely because defendant's counsel opposed that choice on tactical grounds.

(16) **Criminal Law § 238—Trial—Conduct and Deliberations of Jury—Instructions After Submission—Sanity Hearing—Mental Illness—What Constitutes.**—In the sanity hearing in a capital murder prosecution, the trial court's failure to further clarify instructions on what constitutes mental illness, in response to the jury's question during deliberations whether paranoid schizophrenia was a true definition of mental illness, and whether the term "sociopath" or "antisocial personality" is not really a true mental illness, was not prejudicial. The court's insanity instructions did not limit "mental illness" to schizophrenia, but allowed the jury to consider any evidence of defendant's mental condition before or after the crime, and stated that not every form of mental illness constitutes insanity. Although the court could have been more explicit in responding to the jury's inquiry, it is unlikely any such clarification would have aided defendant, as the expert testimony outlining defendant's sociopathic personality relied essentially on his antisocial and criminal behavior, which is not grounds for finding a defendant insane. Moreover, defense counsel approved the court's limited response to the jury's inquiry.

(17) **Criminal Law § 48—Rights of Accused—Fair Trial—Presence at Trial—Conferences—Reading of Testimony.**—No prejudicial error

occurred in defendant's capital murder prosecution from his voluntary absence from various in-chambers conferences and a reading of some guilt phase testimony, where, although no written waiver was made as required under Pen. Code, § 977, defendant's presence did not bear a reasonably substantial relation to the fullness of his opportunity to defend against the charges against him.

(18) **Criminal Law § 48—Rights of Accused—Fair Trial—Presence at Trial—Absence of Counsel—Reading of Testimony.**—In a capital murder prosecution, defendant was not denied assistance of counsel when counsel stipulated that certain testimony could be read to the jury by the court clerk without counsel's presence, where no suggestion was made that actual prejudice occurred by reason of counsel's absence and counsel was aware of the jury's request, and was able to make an informed decision as to the necessity of attending the proceeding.

(19) **Criminal Law § 521—Punishment—Penalty Trial—Evidence—Aggravating Circumstance—Victims' Character Evidence.**—In the penalty phase of a capital prosecution, the trial court did not err in permitting the relatives of three robbery-murder victims to confirm that the victims were friendly, not aggressive persons, who would not have resisted a robbery attempt. The evidence was relevant to support the inference that the victims in all likelihood did not resist the robbery and the violent fatal attack, which in turn bore directly on the manner in which defendant committed the murders, and was thus a circumstance of the crime to which fair comment could be directed.

(20) **Criminal Law § 521—Punishment—Penalty Trial—Evidence—Prior Unadjudicated Crimes.**—Arguments against the introduction of prior unadjudicated crimes as aggravating circumstances in the penalty phase of a capital case are overshadowed by the state's legitimate interest in prosecuting capital cases before a single jury, and in allowing that jury to weigh and consider the defendant's prior criminal conduct in determining penalty, so long as reasonable steps are taken to insure defendant a fair and impartial penalty trial.

(21) **Criminal Law § 521—Punishment—Penalty Trial—Evidence—Prior Unadjudicated Crimes—Dismissed Charges.**—In the penalty phase of a capital case the trial court did not err in admitting as an aggravating circumstance evidence of an unadjudicated prior rape offense, even though the charge had been twice dismissed, which barred further prosecution. Dismissal of charges is not the equivalent of an outright

acquittal and the offense is admissible as aggravating evidence at the penalty phase.

(22) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mitigating Circumstance—Mental Disturbance.**—In the penalty phase of a capital case the jury was properly instructed on defendant's mental condition as a possible mitigating factor by an instruction the jury could consider whether or not the offense was committed while defendant was under the influence of extreme mental or emotional disturbance, but was also to consider any other circumstance which extenuates the gravity of the crime, a provision sufficient to permit the jury to take into account a mental condition which, though not deemed extreme, nonetheless mitigates the seriousness of the offense. The jury was also instructed to consider any sympathetic or other aspect of defendant's character or record that the defendant proffered as a basis for a sentence less than death, with the admonition to disregard any other conflicting instruction.

(23) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Mental Condition and Age.**—The standard instructions on aggravating and mitigating factors given in the penalty phase of a capital case are adequate, despite their failure to identify the aggravating or mitigating character of the various sentencing factors, as such matters should be self-evident to any reasonable person within the context of each particular case.

(24) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Aggravating and Mitigating Factors—Age.**—In the penalty phase of a capital murder prosecution, the statutory word "age" is used as a metonym for any age-related matters suggested by the evidence or by a common experience or mortality that might reasonably inform a choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case.

(25) **Homicide § 101—Punishment—Death Penalty—Constitutionality—1978 Law.**—The 1978 death penalty law is not unconstitutional for failure to require the jury to set forth written findings regarding the various aggravating factors it relied on imposing death. Pen. Code, § 190.4, subd. (e), imposing on the trial court in a capital case the obligation to specify its reasons in ruling on the automatic motion to modify the death sentence, fully satisfies any legitimate equal protection demands.

(26) **Criminal Law § 523—Punishment—Penalty Trial—Instructions—Unanimity as to Uncharged Offenses.**—In the penalty phase of a

capital case, the trial court did not err in failing to instruct the jury that it must unanimously find any uncharged offense has occurred beyond a reasonable doubt, before those offenses could be deemed aggravating circumstances under Pen. Code, § 190.3, factor (b). There is nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty.

(27) **Homicide § 101—Punishment—Death Penalty—Modification Motion—Victim Impact Testimony.**—On appeal from a death penalty sentence, no remand for another modification hearing was required even though various relatives of the victims testified regarding personal characteristics of the victims and expressed their wish that the death sentence be imposed, where the trial court announced its denial of the modification motion before hearing the family member testimony. After announcing its ruling, but before formally sentencing defendant, the trial court then permitted the family members to speak. Although the court indicated it had "considered" the family member testimony, it then outlined the considerable aggravating factors and evidence that it deemed to support imposition of the death sentence, and the family victim testimony was not mentioned.

COUNSEL

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OPINION

LUCAS, C. J.—Defendant Teofilo Medina, Jr., appeals from a judgment imposing the death penalty following his conviction of three counts of first degree murder (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated), accompanied by three special

circumstance findings, namely, robbery-murder (§ 190.2, subd. (a)(17)(i)), burglary-murder (*id.*, subd. (a)(17)(vii)), and multiple murder (*id.*, subd. (a)(3)). Additionally, defendant was convicted of several counts of robbery (§ 211), second degree burglary (§ 459), false imprisonment (§ 236), assault with a deadly weapon (§ 245, subd. (a)(2)), and possession of a firearm by an ex-felon (§§ 12021, 12021.1).

The jury found that the three murders were premeditated and deliberate, and that defendant was sane at the time of the offenses. The jury returned a verdict of death, and the trial court denied defendant's motion to modify the sentence (§ 190.4, subd. (e)). The court imposed the death penalty for the three murders, and a determinate nineteen-year, four-month sentence for the other offenses. Defendant's appeal is automatic. (§ 1239, subd. (b).) Subsequent to the filing of this appeal, defendant filed a habeas corpus petition which we denied without issuing an order to show cause.

I. FACTS

A. *The Offenses*

From October 13 to November 7, 1984, defendant engaged in a crime spree, stealing a gun from a pawnshop, holding up two gas stations, a drive-in dairy, and a market, killing three employees of these establishments (Horacio Ariza, Douglas Metal and Victor Rea), attempting to rob a fourth employee (Moon Yoon), and shooting at two citizens (Cynthia Police and Daniel Barrow) who attempted to follow his getaway car.

Defendant was apprehended after police traced his car to his residence. Police found a gun in defendant's home that, according to prosecution experts, was used to fire the bullets found in the three murder victims. Although other family members lived with defendant, the testimony of his two sisters indicated the gun belonged to him.

Defendant challenged some of the circumstantial evidence linking him to the crimes, but (other than asserting an insanity defense) he neither denied his guilt nor offered any alibi defense.

B. *Competency Phase*

Prior to trial, defendant moved for a competency hearing (§ 1368), claiming his present inability to cooperate with counsel. At the hearing, in addition to lay witnesses, various psychiatrists and other experts testified about defendant's possible paranoid schizophrenia, his violent and aberrant behavior, his attempted suicide, and his inability to cooperate with counsel.

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Dr. Gold, a psychiatrist who knew defendant while he was in the Arizona prison system, testified that defendant was a paranoid schizophrenic and was incompetent to assist his attorney at trial. Dr. Echeandia, a clinical psychologist at the Orange County jail, doubted the accuracy of the schizophrenia diagnosis, and could not express an opinion on defendant's competence to stand trial. Dr. Sharma, a psychiatrist, likewise expressed doubts regarding the schizophrenia diagnosis and leaned toward a finding of competence. Dr. Pierce, a psychologist, believed defendant was schizophrenic, with impaired memory and hallucinations, but nevertheless was competent to stand trial. Dr. Sakurai, a jail psychiatrist, opined that although defendant suffered from depression, he was competent, and that he may have been malingering. Dr. Sheffield, who treated defendant for knife wounds he incurred in jail, could give no opinion on the competency issue.

At the conclusion of the competency hearing, the jury found defendant competent to stand trial.

C. *Sanity Phase*

At the sanity phase, Dr. Gold stated his opinion that defendant was a paranoid schizophrenic who was not guilty of the charged offenses by reason of insanity. Dr. Pierce concluded that although he believed defendant suffered from paranoid schizophrenia, he lacked data from which he might deduce defendant was insane when the offenses occurred. Dr. Sharma agreed that, whether or not defendant was schizophrenic, there was insufficient evidence suggesting he was insane during the offenses. Finally, Dr. Klatte, a psychiatrist, found no evidence of any mental disturbance that might have precluded defendant from knowing the nature of his acts or their wrongfulness.

Defendant took the stand during the sanity phase and testified (along with other lay witnesses) about his background, including his prior offenses and convictions, prison terms, drug use, violent and aberrant behavior, attempted suicide, confinement in a state mental hospital, and attempted escape therefrom. According to defendant, he could not recall shooting the victims, although he remembered being chased by Cynthia Police and shooting over her head.

The jury found defendant was legally sane at the time of the offenses.

D. *Penalty Phase*

The prosecution introduced evidence of defendant's prior violent acts, including his murder of another gas station attendant (Martin) during a

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robbery, assault on a man (Sanchez) in a bar, assault on a prison inmate (Hillyer), and rape (Whitacre). The defense relied on mitigating testimony from Drs. Pierce, Sharma, Sakuri, and Klatte regarding defendant's mental impairment, personality disorder and low intelligence. Defendant's father testified regarding defendant's childhood injury, glue sniffing, and unusual behavior (on one occasion, defendant attempted to pull out his own eyelashes).

II. COMPETENCY PHASE CONTENTIONS

A. *Validity of Section 1369, Subdivision (f)*

(1a) Defendant first contends that section 1369, by placing the burden on him to prove his incompetence to stand trial, is unconstitutional as a denial of due process and equal protection under the state and federal Constitutions. (In fact, none of defendant's authorities involves or discusses equal protection concerns, and he makes no separate argument on the point. Accordingly, we conclude that his argument is essentially a due process challenge to the statutory burden allocation.)

Section 1369, subdivision (f), provides in pertinent part that "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous." The jury was instructed in accordance with this provision. (CALJIC No. 4.10.)

Before addressing defendant's challenge, we set forth the relevant legal principles. Section 1368, subdivision (a), provides that if "a doubt arises in the mind of the judge as to the mental competence of the defendant," the court shall inquire of defense counsel regarding the defendant's competence and, if counsel believes defendant may be incompetent, the court shall order a hearing on the matter. The section further provides that even if defense counsel believes his client is competent, the court may, in its discretion, order a competency hearing. (§ 1368, subd. (b).) Once the hearing is ordered, "all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." (*Id.*, subd. (c).)

(2) It has long been established that the conviction of an accused while he is legally incompetent violates due process. (*Pate* v. *Robinson* (1966) 383 U.S. 375, 385 [15 L.Ed.2d 815, 822, 86 S.Ct. 836].) Indeed, the United States Supreme Court has held that the failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives him of his due process right to a fair trial and requires reversal of his

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conviction. (*Ibid.*; see *Drope* v. *Missouri* (1975) 420 U.S. 162, 171 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896].) Our decisions hold that a competency hearing is required whenever substantial evidence of the accused's incompetence has been introduced. (*People* v. *Hale* (1988) 44 Cal.3d 531, 538-539 [244 Cal.Rptr. 114, 749 P.2d 769]; *People* v. *Stankewitz* (1982) 32 Cal.3d 80, 91-92 [184 Cal.Rptr. 611, 648 P.2d 578]; *People* v. *Laudermilk* (1967) 67 Cal.2d 272, 283 [61 Cal.Rptr. 644, 431 P.2d 228].)

(1b) Defendant argues that because fitness to stand trial is fundamental to an adversary system of justice (*Drope* v. *Missouri, supra,* 420 U.S. 162, 171-172 [43 L.Ed.2d 103, 112-113]), due process dictates that once the defendant has raised a bona fide doubt as to his competence, the state must carry the burden of proving him competent. Accordingly, defendant argues, section 1369 and its contrary allocation of the proof burden should be declared unconstitutional.

The validity of section 1369, its presumption of competence and burden of proof allocation, apparently has never been discussed in a published opinion. (Cf. *People* v. *Bye* (1981) 116 Cal.App.3d 569, 573-578 [172 Cal.Rptr. 186] [constitutional to permit *prosecution* to establish defendant's incompetence by mere preponderance of evidence]; *People* v. *Eckstrom* (1977) 71 Cal.App.3d 259, 261-262 [139 Cal.Rptr. 341] [constitutional to require defendant to prove his *insanity*].) The cases from other state and federal jurisdictions are in conflict on the constitutional propriety of placing on the defendant the burden of proving his own incompetence.

Some cases suggest that due process principles forbid requiring a defendant whose competence is in doubt to carry the proof burden. (See *United States* ex rel. *Bilyew* v. *Franzen* (7th Cir. 1982) 686 F.2d 1238 (*Bilyew*); *United States* v. *DiGilio* (3d Cir. 1976) 538 F.2d 972, 986-989, cert. den. 429 U.S. 1038 [50 L.Ed.2d 749, 97 S.Ct. 733] (*DiGilio*); *State* v. *Jones* (S.D. 1987) 406 N.W.2d 366, 368-369 [decision based on state constitutional law]; *People* v. *McCullum* (1977) 66 Ill.2d 306 [362 N.E.2d 307, 310-311] [same].)

Other cases find no due process or other constitutional objection to placing the proof burden on a defendant who has asserted his own incompetence. (See *Lowenfield* v. *Phelps* (5th Cir. 1987) 817 F.2d 285, 294, sub. opn. (1988) 484 U.S. 231 [98 L.Ed.2d 568, 108 S.Ct. 546]; *State* v. *Pruitt* (1984) 18 Ohio App.3d 50 [480 N.E.2d 499, 509] [conc. opn.]; cf. Robinson, Criminal Law Defenses (1984) § 208(c), p. 505 [burden of production "is usually on the party seeking to establish the incompetency; this is usually the defendant"]; *State* v. *Pedersen* (Iowa 1981) 309 N.W.2d 490, 496 [same].)

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The first line of cases stresses the unfairness of requiring a defendant who might be incompetent to shoulder the burden of proving it. In *DiGilio*, for example, the court observed that the United States Supreme Court had found it "contradictory" to suggest that a defendant may be incompetent yet capable of knowingly waiving his right to raise the issue. (538 F.2d at p. 988, citing *Pate* v. *Robinson, supra,* 383 U.S. at p. 384 [15 L.Ed.2d at p. 821].) According to *DiGilio*, it is similarly contradictory to argue that a possibly incompetent defendant is nonetheless presumed to possess sufficient intelligence to adduce evidence of his incompetency. (538 F.2d at p. 988.)

DiGilio involved federal procedure, and thus had no occasion to discuss the constitutionality of state statutes allocating the proof burden to the defendant. But in *Bilyew, supra,* 686 F.2d 1238, the court found unconstitutional an Illinois statute that placed the burden of proving incompetence on the defendant. The court stated "There is little question that the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised. [Fn. omitted.] Every court that has considered the issue has so held. [Citations.]" (*Id.*, at pp. 1244-1245.)

The *Bilyew* court agreed with the reasoning of Illinois state court decisions (e.g., *People* v. *McCullum, supra,* 362 N.E.2d 307, 310-311) that if we assume a defendant is incompetent and unable to cooperate with counsel, it would be a "strange rule" to impose on him the burden of proving his incompetence, for the very disability he seeks to prove may render him incapable of proving it. (*Bilyew, supra,* 686 F.2d at p. 1245.)

On the other hand, despite *Bilyew*'s assertion, there is substantial authority supporting a contrary view. The United States Supreme Court has consistently upheld state statutes imposing on the defendant the burden of establishing his own *insanity*, despite the possibility that his mental condition may well prevent an effective showing. (*Leland* v. *Oregon* (1952) 343 U.S. 790, 798-799 [96 L.Ed. 1302, 1308-1309, 72 S.Ct. 1002] (*Leland*); see *Martin* v. *Ohio* (1987) 480 U.S. 228, 236 [94 L.Ed.2d 267, 275-276, 107 S.Ct. 1098] [upholding, against due process attack, Ohio statute placing proof burden on defendant claiming self-defense]; see also *Rivera* v. *Delaware* (1976) 429 U.S. 877 [50 L.Ed.2d 160, 97 S.Ct. 226] [dis. opn. on dismissal of appeal].)

In *Leland*, the high court upheld an Oregon statute requiring the defendant in a criminal case to prove his insanity beyond a reasonable doubt. The court observed that the state must prove only those facts encompassing elements of the crime charged, and sanity is not such an element. (343 U.S.

at pp. 798-799 [96 L.Ed.2d at pp. 1308-1309].) The court rejected a due process challenge, stating that "we are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." (*Id.*, at p. 799 [96 L.Ed. at p. 1309].)

Leland remains good law. As the high court recently indicated in upholding an Ohio statute requiring the defendant to carry the burden of proving self-defense, *Leland* has withstood repeated challenge (see, e.g., *Rivera* v. *Delaware, supra,* 429 U.S. 877) and is "authority for our decision today." (*Martin* v. *Ohio, supra,* 480 U.S. at p. 236 [94 L.Ed.2d at p. 276]; see also *Patterson* v. *New York* (1977) 432 U.S. 197, 201-205 [53 L.Ed.2d 281, 286-289, 97 S.Ct. 2319] [following *Leland*].) If we applied *Leland* to the present case, section 1369 seemingly would survive a federal due process attack, for defendant's competence to stand trial bears only on his mental state and is no more an element of the crime charged than is his sanity. (See *State* v. *Jones, supra,* 406 N.W.2d 366, 368-369 [acknowledging *Leland* controls federal due process question as applied to competency proof allocation, but adopting different rule under South Dakota Constitution]; cf. *People* v. *Fields* (1965) 62 Cal.2d 538, 540 [42 Cal.Rptr. 833, 399 P.2d 369, 16 A.L.R.3d 708] [competency proceeding not criminal in nature]; *People* v. *Bye, supra,* 116 Cal.App.3d 569, 574 [same].)

Thus, a recent federal case, *Lowenfield* v. *Phelps, supra,* parted company with the *DiGilio* and *Bilyew* cases previously discussed, and upheld a Louisiana statute that, like section 1369, placed on defendant the burden of proving, by a preponderance of the evidence, his incompetence to stand trial. First, the court observed that no other federal circuit had adopted a contrary approach, and noted that *Bilyew* uncritically adopted Illinois state court cases on the issue. Second, *Lowenfield* reasoned that, although *Congress* unquestionably had placed on federal prosecutors the burden of proving the defendant's competence (e.g., 18 U.S.C. § 4241), that fact did not support *Bilyew*'s assumption that the federal *Constitution* requires the states to conform to federal law. *Lowenfield* noted that, as indicated in *Leland* v. *Oregon, supra,* 343 U.S. 790, 798-799 [96 L.Ed. 1302, 1308-1309], the states ordinarily have great latitude to decide the proper placement of proof burdens. Accordingly, the *Lowenfield* court concluded, "We see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant merely because Congress chose to place that burden on the government in federal prosecutions." (817 F.2d at p. 294.)

We conclude that the Fifth Circuit's holding in *Lowenfield* v. *Phelps, supra,* 817 F.2d 285, correctly expresses the applicable due process princi-

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ples under the federal Constitution. As for defendant's suggestion that we adopt a different rule under the California Constitution, we believe that sound practical and policy considerations support *Lowenfield*.

In determining the propriety of a particular proof allocation, a critical factor is the extent to which either party has access to the relevant information. As stated in *Morrison* v. *California* (1934) 291 U.S. 82, 89 [78 L.Ed. 664, 669-679, 54 S.Ct. 281], due process generally allows shifting to the defendant the burden of proving his affirmative defenses if, "upon a balancing of convenience or of the opportunities for knowledge," the burden shift does not subject the defendant to hardship or oppression. (See also *Harris* v. *Irish Truck Lines, Inc.* (1974) 11 Cal.3d 373, 378 [113 Cal.Rptr. 489, 521 P.2d 481]; 1 Witkin, Cal. Evidence (3d ed. 1986) §§ 137-138, pp. 119-121 [citing cases stressing importance of one party's knowledge or access thereto in allocating proof burden].)

Applying this principle to the present case, one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry. Indeed, this analysis affords a satisfactory answer to *Bilyew*'s (*supra,* 686 F.2d 1238) concern about the defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability. The People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings.

In addition to asserting the invalidity of the proof allocation in section 1369, defendant also challenges the presumption of competence set forth therein. According to defendant, it is irrational to preserve that presumption *after* a doubt arises regarding defendant's competence. We believe the issue is controlled by the cases and analysis previously set forth regarding the allocation of the proof burden. The primary significance of the presumption of competence is to place on defendant (or the People, if they contest his competence) the burden of rebutting it. By its terms, the presumption of competence is one which affects the burden of proof and, accordingly, it remains in effect despite the introduction of some evidence of incompetence. (See Evid. Code, §§ 500, 550, 603-605.) We decline to hold as a matter of due process that such a presumption must be treated as a mere presumption affecting the burden of production, which disappears merely because a preliminary, often undefined and indefinite, "doubt" has arisen that justifies further inquiry into the matter.

We conclude that section 1369 passes constitutional muster under both the federal and state Constitutions. Accordingly, we need not address the

People's alternative contention that any error in proof allocation was harmless in light of the "clear evidence" of defendant's competence. (Compare *Lowenfield* v. *Phelps, supra,* 817 F.2d at p. 295, with *Bilyew, supra,* 686 F.2d at p. 1245.)

B. *Improper Opinion Testimony*

(3) Next, defendant contends the court erred in permitting the prosecutor, over objection, to elicit an opinion from a nonexpert witness regarding defendant's mental state and degree of awareness while in jail. The point lacks merit.

As previously indicated, at the competency hearing both parties elicited expert and nonexpert testimony regarding defendant's state of mind. Thus, in addition to psychiatric experts, the People called J. D. Green, a deputy sheriff, who testified that he conversed with defendant in 1986 at the Orange County jail following his arrest. The conversation concerned defendant's "housing" situation, and his need for protective custody. According to Deputy Green, he was able to communicate with defendant, who understood the conversation and was "very responsive" and "very descriptive" in discussing his housing problem.

In addition to Deputy Green and several psychiatric experts, the People called Richard Negrette, defendant's former parole officer, who testified (over defendant's objection) that defendant acted rationally during their conversations in 1984. Defendant likewise called some lay persons to testify regarding his incompetence, including his sister and a defense investigator, each of whom related defendant's difficulty in conducting a rational conversation.

Defendant argues that because the sole issue at the competency hearing concerned his ability to understand the nature of the criminal proceedings and to assist his counsel (see § 1367), Deputy Green's nonexpert opinion regarding defendant's state of mind was irrelevant and inadmissible. Defendant observes that Green's many years of law enforcement experience did not qualify him as an expert in judging a suspect's state of mind. (See *People* v. *Kelly* (1976) 17 Cal.3d 24, 39 [130 Cal.Rptr. 144, 549 P.2d 1240]; *People* v. *Sergill* (1982) 138 Cal.App.3d 34, 39-40 [187 Cal.Rptr. 497] [inadmissible police testimony regarding defendant's character and veracity]; Evid. Code, § 720, subd. (a).) Defendant also asserts that Green was unqualified to express an opinion as a *lay* witness. (See *People* v. *Melton* (1988) 44 Cal.3d 713, 744 [244 Cal.Rptr. 867, 750 P.2d 741] [inadmissible lay opinion regarding defendant's veracity].)

The People concede that Deputy Green was not an expert qualified to state an opinion regarding defendant's state of mind, but they argue he was adequately qualified to state a lay opinion as to whether defendant understood what Green was saying. (See Evid. Code, § 800; *People* v. *Farmer* (1989) 47 Cal.3d 888, 908 [254 Cal.Rptr. 508, 765 P.2d 940] [discretionary to admit lay opinion testimony].) The People observe that, unlike *Melton* and *Sergill*, both *supra*, Deputy Green was not asked his opinion regarding defendant's *veracity*, but simply whether defendant appeared to understand their conversation.

In light of the discretion vested in the trial court to permit lay opinion testimony, the nature of the other evidence admitted at the competency hearing, and the rather limited responses elicited from Deputy Green, we see no error. Similar testimony from police or jail personnel regarding the defendant's apparent mental state has been admitted in at least one other capital case (see *People* v. *Ghent* (1987) 43 Cal.3d 739, 752 [239 Cal.Rptr. 82, 739 P.2d 1250] [testimony of interrogating officer that defendant did not seem disoriented]; cf. Evid. Code, § 870, subd. (c) [opinion of person's "sanity"]), and the challenged testimony appears reasonably relevant to the question whether a defendant is presently able to communicate with his counsel at trial. As the trial court acknowledged in this case, objections to such lay testimony relate more to weight than to admissibility.

C. *Evidence of Defendant's Prior Crimes and Convictions*

Next, defendant asserts the prosecutor, during the competency hearing, committed misconduct in presenting evidence and argument regarding defendant's prior criminal acts and convictions. Defendant observes that evidence was admitted regarding (1) his 1968 conviction for firing a shotgun in a bar, (2) his 1977 rape, kidnapping and lewd conduct convictions, (3) his status as a registered sex offender and parolee, and (4) his various violent acts committed while in custody.

Most of these matters were first elicited *without objection*, on cross-examination of defense experts, for the proper purpose of determining the facts on which they based their opinions regarding defendant's incompetence. (See *People* v. *Malone* (1988) 47 Cal.3d 1, 31-32 [252 Cal.Rptr. 525, 762 P.2d 1249]; *People* v. *Hendricks* (1988) 44 Cal.3d 635, 642 [244 Cal.Rptr. 181, 749 P.2d 836].) (4) Defendant maintains, however, that the prosecutor should not have made further reference to these matters (which remained largely unproved or without proper foundation) in his closing arguments. Defendant observes he made proper objection to these arguments. (See *People* v. *Green* (1980) 27 Cal.3d 1, 27 [164 Cal.Rptr. 1, 609 P.2d 468].) He contends the prosecutor's remarks "placed undue emphasis on [his] violent

background," thereby shifting the focus of the hearing from competency to "propensity to commit 'bad' acts . . . ."

We have reviewed the record and find no misconduct. The prosecutor simply outlined the competency hearing testimony, and the facts on which that testimony was based, including occasional references to defendant's prior acts and convictions. Throughout his argument, the prosecutor explained to the jurors that his comments were not evidence, that the sole issue then before them was defendant's competence, and not his guilt of any crimes, and that any evidence of such crimes was introduced for the sole purpose of determining the competency issue, and not to show that defendant was "a bad guy."

The trial court similarly instructed the jury that the prosecutor's comments were not evidence, and that any evidence introduced for a limited purpose, including the exhibits containing references to defendant's prior criminal record, should be considered only for that purpose.

We conclude the jury's competency finding should be upheld.

III. Guilt Phase Contentions

A. *Failure to Discharge Venire*

(5) Defendant argues the court erred in failing to discharge the entire jury venire after learning that some prospective jurors indicated they were biased against defendant. Prospective juror Sturgeon stated on voir dire that she had heard her fellow venirepersons make statements such as "even his own lawyers think he's guilty," and "they ought to have [*sic*] him and get it over with."

At defendant's request, the court held a hearing on the matter. On further examination, Sturgeon asserted that at least five prospective jurors had made such remarks, and she identified some persons who she believed had either made such comments or had overheard them being made. Prospective juror Durling confirmed that he and a few other venirepersons, while in the court elevator, had made statements such as "in frontier justice style," the authorities should "bring the guilty S.O.B. in, we'll give him a trial, and then hang him." Prospective juror Clasen stated he had heard similar comments from other venirepersons.

Defendant thereupon moved to discharge the entire venire, on the ground that it had become tainted and further inquiry would only aggravate the situation. The trial court denied the motion without prejudice to a renewed

motion following further voir dire. Defendant declined to conduct such voir dire, asserting it would be impossible to further explore juror bias without antagonizing the jurors and creating added bias against defendant.

The People observe that none of the prospective jurors implicated during the bias hearing actually served on defendant's jury, and each person selected for the jury affirmed his or her ability to be fair and impartial. Moreover, the People note that defendant failed to exhaust his peremptory challenges and, accordingly, cannot complain of any error in failing to exclude particular jurors. (See, e.g., *People* v. *Coleman* (1988) 46 Cal.3d 749, 770-771 [251 Cal.Rptr. 83, 759 P.2d 1260].) We question the application of the foregoing rule to situations in which the defendant complains of a failure to discharge an entire venire, for we could not expect the defendant to expend his peremptory challenges in a vain attempt to exclude every member of the venire. But for other reasons, we think the People's basic position has merit.

We believe the trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required. Defendant cites no case, and we have found none, indicating that such a drastic remedy is appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks. Unquestionably, further investigation and more probing voir dire examination may be called for in such situations, but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant. The present case falls short of that mark. We conclude the trial court did not err in declining to discharge the entire venire.

B. *The Adoptive Admissions Rule*

Shortly after defendant's arrest, his sister Sylvia Ayala visited him in jail. She asked him "why did you have to shoot those three poor boys?" Defendant initially made no response. After embracing his sister, he later indicated he did not wish to talk about the matter. Soon thereafter, however, defendant told his sister that "every dog has his day, every cat has his night," and he mentioned the Bible and the Book of Revelations.

(6a) Over defendant's hearsay objection, the trial court admitted evidence of the foregoing conversation, ruling that defendant's initial silence in response to his sister's inquiry was admissible as a possible adoptive admission should the jury so find. (See Evid. Code, § 1221 [statement by another may be deemed adopted by party's "words or other conduct"]; *People* v.

Silva (1988) 45 Cal.3d 604, 623-625 [247 Cal.Rptr. 573, 754 P.2d 1070].) Defendant, relying on self-incrimination and due process principles derived from the Fifth and Fourteenth Amendments to the United States Constitution, now contends that the premise underlying the adoptive admissions rule (namely, that silence in the face of an accusatory statement may constitute an admission of guilt), is invalid and irrational. According to defendant, the rule "unconstitutionally penalizes constitutionally-protected conduct," i.e., the right to remain silent following arrest.

Defendant cites authorities suggesting that in the criminal context, it is unreasonable to expect the accused to respond to an accusation of guilt. (E.g., Gamble, *The Tacit Admissions Rule: Unreliable and Unconstitutional* (1979) 14 Ga.L.Rev. 27; *Commonwealth* v. *Vallone* (1943) 347 Pa. 419 [32 A.2d 889, 892] [dis. opn.].) Indeed, once *Miranda* (*Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974]) warnings have been given, it may be constitutionally improper to introduce evidence of an accused's postarrest silence. (See *Fletcher* v. *Weir* (1982) 455 U.S. 603, 605-607 [71 L.Ed.2d 490, 493-494, 102 S.Ct. 1309]; *Doyle* v. *Ohio* (1976) 426 U.S. 610, 619 [49 L.Ed.2d 91, 98, 96 S.Ct. 2240].) The record fails to show that defendant was given *Miranda* warnings prior to his conversation with his sister. Although the record contains a bare assertion to that effect from trial counsel, the record is otherwise silent on the matter, and it seems doubtful that counsel had personal knowledge of the facts as he was not present during the interrogation.

Appellate counsel now asks us to take judicial notice of a purported police report and related transcript of a police interrogation with defendant in which such warnings were given, but counsel has made no attempt to authenticate or certify either the report or the transcript. (See *Goshgarian* v. *George* (1984) 161 Cal.App.3d 1214, 1225 [208 Cal.Rptr. 321]; *People* v. *Preslie* (1977) 70 Cal.App.3d 486, 494-495 [138 Cal.Rptr. 828]; cf. *State Compensation Ins. Fund* v. *Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3 [219 Cal.Rptr. 13, 706 P.2d 1146].) Accordingly, the motion is denied.

But even if we assume for purposes of argument that such warnings were given here, in the context of the present case, where defendant was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims.

The record does not suggest that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right. Defendant's conversation with his

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sister apparently was not monitored, for the officers learned of Mrs. Ayala's accusation and defendant's response when she talked to them after the interview. We are not here concerned with, and do not address, the situation in which an in-custody, *Mirandized*, suspect is confronted with an accusatory statement in circumstances where he may be presumed to suspect the monitoring of his conversation. We do not decide whether, in such circumstances, application of the adoptive admissions rule would be unfair, essentially requiring the defendant to respond to avoid an adverse inference of guilt if he remains silent.

(7) As we recently explained, "to warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]" (*People* v. *Edelbacher* (1989) 47 Cal.3d 983, 1011 [254 Cal.Rptr. 586, 766 P.2d 1].) In the present case, the jury was not directed to draw an inference of guilt, but was merely told (CALJIC No. 2.71.5) that defendant's silence "may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

In *People* v. *Silva, supra,* 45 Cal.3d at page 624, where a similar instruction was given, we observed that if a defendant remains silent in the face of an accusatory statement from a person *other* than a police officer, his silence "'lead[s] reasonably to the inference that he believes the accusatory statement to be true.' . . . Here, defendant [Silva] heard Shelton describe the circumstances surrounding Kevin's murder . . . and smiled without protesting or denying Shelton's description . . . . This evidence was sufficiently relevant to be submitted to the jury under appropriate instructions." (Quoting from 1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 3.3, p. 175.)

(6b) In sum, although as previously indicated the use of the adoptive admissions rule may be unwarranted in some situations, including some custodial interrogations, we see no valid constitutional objection to its application in cases where the defendant reasonably could be expected to respond to, and deny, the accusatory statement. (See also *Silva, supra,* 45 Cal.3d at pp. 623-625.) Thus, we reject defendant's broad constitutional challenge to the adoptive admissions rule.

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C. *Ayala's Police Agent Status*

In a related argument, defendant contends the trial court erred in failing to afford him the opportunity to demonstrate that his sister, Silvia Ayala, was acting as a police agent at the time she met with him in jail, as previously discussed. The point lacks merit.

At the foundational hearing aimed at determining the admissibility of evidence of defendant's adoptive admission, evidence was adduced indicating that Mrs. Ayala had previously been told by police officers of the charges against defendant, and that she was allowed by the officers to visit him in private. Although Mrs. Ayala was not asked by the police to discuss the charges with defendant, she was interrogated by a police investigator immediately *following* her visit. As previously indicated, Mrs. Ayala related defendant's conduct and statements to the officers.

Defense counsel, evidently hoping to establish that the officers were giving Mrs. Ayala special treatment, asked her whether they had informed her of the jail policy to allow defendant no visitors other than an attorney or bondsman. The prosecutor's hearsay objection was sustained. Defendant did not call police personnel to directly establish jail visitation policy, or to determine whether the officers informed Mrs. Ayala regarding such policy. Nor did defendant ask the officers about her possible status as a police agent.

Defendant now complains he was improperly foreclosed from attempting to establish Mrs. Ayala's police agent status by showing that she been given special visitation privileges in return for eliciting inculpatory statements from her brother. (See, e.g., *Kuhlmann* v. *Wilson* (1986) 477 U.S. 436, 459 [91 L.Ed.2d 364, 384-385, 106 S.Ct. 2616]; *Rhode Island* v. *Innis* (1980) 446 U.S. 291, 301 [64 L.Ed.2d 297, 308, 100 S.Ct. 1682].)

None of the police agent cases cited by defendant indicates that it would have been improper for the officers to grant an inmate's relatives special visitation privileges in the *unspoken* hope that they might elicit statements from defendant and inform the officers thereof. (See *Arizona* v. *Mauro* (1987) 481 U.S. 520, 529 [95 L.Ed.2d 458, 468, 107 S.Ct. 1931].) In any event, it is apparent that defendant had ample opportunity to explore the issue through his own examination of the police officers, yet he failed to do so. The People's successful hearsay objection certainly did not preclude such alternate methods of inquiry.

(8) Defendant suggests his trial counsel may have been incompetent in failing to pursue such further inquiry. Yet it is entirely possible counsel

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tactically declined to pursue the matter, doubting he could establish that defendant's sister was an agent of the government and acting against his best interests. (See *People* v. *Pope* (1979) 23 Cal.3d 412, 426 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].)

Moreover, to establish grounds for relief based on incompetence of counsel, defendant must show a reasonable probability that, but for counsel's omissions, the verdict would have been different. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 697-698, 104 S.Ct. 2052].) No such showing is made here. Defendant has not demonstrated that further inquiry would have established Mrs. Ayala's status as a police agent, or that as a consequence defendant's adoptive admission would have been excluded. Thus, we have no basis for concluding counsel's omission prejudiced defendant's case.

D. *Failure to Preserve Evidence*

The officers investigating the murder of Douglas Metal found a Perrier bottle lying atop a freezer at the dairy where he worked. Officer Barnes took one fingerprint from the bottle, but inadvertently failed to retain the bottle itself, which was lost or destroyed. At trial, the print was identified by a prosecution expert as matching defendant's prints; a defense expert disputed the identification. Both prosecution and defense experts agreed, however, that the print bore two unexplained "points of dissimilarity."

Defendant moved to exclude the print evidence based on the People's failure to preserve the bottle. The trial court denied the motion on the basis that exclusion of evidence for failure to preserve other evidence is appropriate only if the exculpatory value of the lost evidence was apparent to the police *before* its loss. (*California* v. *Trombetta* (1984) 467 U.S. 479, 488-489 [81 L.Ed.2d 413, 421-422, 104 S.Ct. 2528]; see *People* v. *Johnson* (1989) 47 Cal.3d 1194, 1233-1234 [255 Cal.Rptr. 569, 767 P.2d 1047] [adopting *Trombetta* rule].) In *Johnson*, the defendant similarly argued that inculpatory fingerprint evidence should be excluded because the People improperly failed to preserve a catalog bearing those prints. We rejected the argument because the catalog "did not have an exculpatory value that was obvious at the time of the test . . . ." (47 Cal.3d at p. 1235.) Here, of course, the investigating officer likewise could not know at the time the prints were taken whether, or to what extent, the Perrier bottle's print matched defendant's prints.

(9) Defendant now argues the court should have instructed the jury sua sponte that, because of the police officer's negligent failure to preserve the bottle, the jury should draw any conflicting inferences regarding the prints

in favor of defendant. (See *Arizona* v. *Youngblood* (1988) 488 U.S. 51, 54-55 [102 L.Ed.2d 281, 287, 109 S.Ct. 333] [similar instruction given by trial court].) In addition, defendant would require a sua sponte instruction that, by reason of their failure to preserve the bottle, the People's fingerprint evidence should be viewed with "distrust." We reject both contentions.

Once the defendant has proved a loss of material evidence, the trial court has discretion to impose appropriate sanctions, including fashioning a suitable cautionary instruction. (See *People* v. *Zamora* (1980) 28 Cal.3d 88, 99-103 [167 Cal.Rptr. 573, 615 P.2d 1361]; *People* v. *Gonzales* (1989) 209 Cal.App.3d 1228, 1233, 1234 [257 Cal.Rptr. 828].) But neither *Trombetta* nor *Youngblood* held that instructions such as those proposed by defendant are required sua sponte, and we are reluctant to impose such an instructional sanction for mere negligence in failing to preserve evidence whose exculpatory value was unapparent to the officers when their omission occurred. *Youngblood* held that the defendant must show the police acted in "bad faith" in order to demonstrate a due process violation based on failure to preserve potentially useful evidence. (488 U.S. at p. 51 [102 L.Ed.2d at p. 289].) The court merely noted in passing that the trial court gave the instruction cited by defendant herein. (*Id.* at p. 287.)

The Courts of Appeal have uniformly rejected claims of error grounded on the failure to give similar instructions. (See *People* v. *Huston* (1989) 210 Cal.App.3d 192, 212-215, & fn. 5 [258 Cal.Rptr. 393]; *People* v. *Gonzales*, *supra*, 209 Cal.App.3d 1228, 1233-1234; *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1218 [255 Cal.Rptr. 691].) None of these cases indicates any basis for a sua sponte instruction of the kind given in *Youngblood*, if no bad faith failure to preserve exculpatory evidence is involved. We conclude that, under the circumstances of this case, the trial court did not err in failing to instruct sua sponte that any conflicting inferences should be drawn in defendant's favor, or that the People's evidence should be viewed with distrust.

E. *Prosecutorial Misconduct*

1. *Attack on Expert Testimony*—Defendant contends the prosecutor improperly mounted a personal attack on Lee Smith, one of the defense experts. Smith, who was qualified as a fingerprint expert, testified that the print on the Perrier bottle did not match defendant's prints. (As previously indicated, a People's expert disagreed.) In his closing guilt phase arguments, the prosecutor accused Smith (among other things) of "prostituting" the judicial system, of "selling out," and of earning "a thousand dollars on this case." According to the prosecutor, Smith was "motivated solely by greed" and "dishonest." The prosecutor reviewed evidence disclosing that Smith

had participated as a paid expert in several prior criminal trials in which his prodefense opinions were challenged and ultimately rejected.

(10) Defendant maintains the prosecutor's attack on Smith exceeded the proper bounds of fair comment on an expert's credentials or credibility. Although the prosecutor was entitled to point out that Smith was a paid expert and to otherwise question his competency or credibility based on evidence in the record (see Evid. Code, §§ 722, subd. (b), 721, subd. (a); *People* v. *Washington* (1969) 71 Cal.2d 1061, 1086 [80 Cal.Rptr. 567, 458 P.2d 479]), defendant submits that the accusations of "prostitution," dishonesty and greed were unnecessary and excessive (see *People* v. *McGreen* (1980) 107 Cal.App.3d 504, 514-519 [166 Cal.Rptr. 360] [prosecutor accused defense expert of selling his credentials, and being a "habitual and chronic liar"]).

We need not decide whether the prosecutor's remarks exceeded fair comment on the evidence elicited at trial, because defendant failed to object to the foregoing comments or seek an appropriate admonition, and must be deemed to have waived his objection. (See *People* v. *Edelbacher*, *supra*, 47 Cal.3d at p. 1030; *People* v. *Green*, *supra*, 27 Cal.3d 1, 27.) Although defendant suggests the misconduct was so pervasive and offensive that an admonition would have been useless (see *McGreen*, *supra*, 107 Cal.App.3d at p. 519), a timely objection and admonition by the court at the outset might have tempered the prosecutor's aggressiveness *before* it became so extreme. That being so, it seems reasonable to place on defendant the burden of making a timely objection.

We likewise reject defendant's assertion that counsel's failure to object may have reflected his incompetence. As we have previously noted herein, to obtain relief on incompetent counsel grounds, defendant must show a reasonable probability that his counsel's omission affected the verdict. (*Strickland* v. *Washington*, *supra*, 466 U.S. 668, 694 [80 L.Ed.2d 647, 697-698].) We have no sound basis for reaching such a conclusion here.

2. *Comments on Defendant's Courtroom Behavior*—On two separate occasions during the guilt phase, the prosecutor commented on defendant's nontestimonial conduct. First, during the prosecutor's examination of defendant's sister regarding a tape recording of an interview with police officers, defendant evidently began laughing, prompting the prosecutor to observe that "the defendant apparently thinks [the tape recording is] funny." The court admonished the prosecutor and defendant not to engage in further "colloquy," and defendant remarked "Can't help it, your honor."

The second occasion arose when the prosecutor in closing argument characterized defendant as "a cold calculating, cowardly killer," who

placed his victims on the ground before executing them. Defendant interrupted the argument by stating "I think you are chickenshit," and the prosecutor thereupon replied "He can do it right now; he can mouth off right now because he knows there's nothing going to happen. He's all secure over there right now, and he doesn't have the guts to face what's [*sic*] he's doing here. And that's why he has to mouth off." Although defense counsel told defendant to "stop it" after his interjection was made, counsel made no objection to the prosecutor's response.

(11) Defendant, observing that he elected not to testify at trial, contends the prosecutor committed misconduct in commenting on his "demeanor." (See *People* v. *Heishman* (1988) 45 Cal.3d 147, 197 [246 Cal.Rptr. 673, 753 P.2d 629] [general rule prohibiting comment on nontestifying defendant's courtroom behavior]; *People* v. *Garcia* (1984) 160 Cal.App.3d 82, 93 [206 Cal.Rptr. 468] [prosecutor's improper comment on defendant's "snickering" at witness's testimony]; *United States* v. *Schuler* (9th Cir. 1987) 813 F.2d 978, 979-980 [comment on nontestifying defendant's laughter during testimony].)

First, we note that defendant failed to object to the prosecutor's comments, or seek an admonition, and accordingly any claim of error was waived. (*People* v. *Green, supra,* 27 Cal.3d 1, 27; see *People* v. *Gilliam* (1974) 41 Cal.App.3d 181, 194-195 [116 Cal.Rptr. 317] [failure to object to prosecutor's comments on defendant's smiling during prosecutor's argument].) Second, the prosecutor's brief comment on defendant's laughter was so minor as to be entirely harmless. The jury was not asked to draw any adverse inferences of guilt from defendant's conduct.

Finally, although the prosecutor's subsequent comments were somewhat more serious, incorporating defendant's "chickenshit" remark into the prosecutor's theme of defendant's cowardice and cruelty, in context, the prosecutor was simply reacting spontaneously to defendant's gratuitous interruption of the proceedings, rather than commenting reflectively on his demeanor. Under the circumstances, any misconduct was harmless. The evidence of defendant's guilt was substantial; no defense was offered other than an attempt to dispute the fingerprint evidence tying him to *one* of the three murders. As in *Garcia, supra,* 160 Cal.App.3d at page 95, and *Gilliam, supra,* 41 Cal.App.3d at pages 194-195, we conclude that any prosecutorial misconduct in the present case was likewise nonprejudicial. It was not reasonably probable that a more favorable result would have occurred had the prosecutor's comments not been made. (See *Garcia,* at p. 93, & fn. 12.) In addition, we do not find it reasonably possible the asserted misconduct affected the jury's penalty deliberations.

F. *Shackling Defendant*

(12) Before trial, the prosecutor moved to shackle defendant, based on his prior record and history of violence, including a long list of disturbances and assaults while in custody. (Defendant was muscular, weighed over two hundred and thirty pounds and was around six feet three inches tall.) The prosecutor agreed, however, to allow defendant to remain unshackled as long as he behaved properly; defendant was so advised and he stated he understood. Nonetheless, during the competency phase testimony, he suddenly cried out, stood up and turned over the counsel table. Accordingly, the court ordered defendant shackled for the remainder of the trial, despite defendant's subsequent promise to behave. (On one occasion, defendant objected to being photographed, stating that if he were not "chained up" he would have thrown his chair at the photographer.)

Defendant first contends that the court abused its discretion in ordering him shackled without considering less drastic measures of maintaining security. He observes that the applicable authorities have characterized shackling as a "last resort" to be used where a manifest need therefor arises and no lesser measures would suffice. (See *Illinois* v. *Allen* (1970) 397 U.S. 337, 343-344 [25 L.Ed.2d 353, 358-359, 90 S.Ct. 1057]; *People* v. *Allen* (1986) 42 Cal.3d 1222, 1261-1265 [232 Cal.Rptr. 849, 729 P.2d 115]; *People* v. *Duran* (1976) 16 Cal.3d 282, 290 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1].)

Defendant recognizes that recent cases of this court have upheld shackling in similar situations involving defendants who have a prior record of violence or who have displayed violent behavior in the courtroom. (E.g., *People* v. *Sheldon* (1989) 48 Cal.3d 935, 945-946 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People* v. *Hamilton* (1985) 41 Cal.3d 408, 423-424 [221 Cal.Rptr. 902, 710 P.2d 981].) Based on our holdings in those cases, we find no abuse of discretion here, where the record on its face demonstrated a manifest need to shackle defendant following his violent behavior.

(13) Defendant also complains of the court's failure to instruct the jury, sua sponte, that the restraints "should have no bearing on the determination of the defendant's guilt." (*Duran, supra,* 16 Cal.3d at pp. 291-292.) *Duran* required such an instruction in cases in which the restraints were visible to the jury prior to its *guilt* determination. (*Ibid.*) Here, as the People point out, although there are indications that some *prospective* jurors noticed defendant's shackles during voir dire examination, nothing in the record indicates the shackles were visible to the jury which determined his guilt. Although defendant testified during the *sanity* phase, and we may infer that

his shackles were then viewed by the jury, the risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined.

Even assuming the court erred in failing to frame an instruction on shackling, the error was not prejudicial. In *Duran*, our reversal of the judgment was based on a combination of errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the shackling of a defendant who elected to testify at the guilt phase. As we noted in *Duran*, the defendant's visible wrist and ankle restraints could have damaged his credibility as a witness. (16 Cal.3d at p. 296.)

In the present case, defendant did not testify at the guilt phase, and the failure to admonish the jury to ignore his shackles was unaccompanied by other substantial errors. We conclude that any error in failing to instruct more directly on the shackling issue was harmless. (See *People* v. *Rich* (1988) 45 Cal.3d 1036, 1084-1085 [248 Cal.Rptr. 510, 755 P.2d 960].)

G. *Use of Mannequins*

(14) Defendant next contends the court erred in allowing the prosecution to display three life-size mannequins throughout the course of the trial. These mannequins were designed with rods sticking through them to show the bullet trajectories as to the three murder victims, some of whom may have been executed while in a helpless position. In addition, the prosecution placed one victim's bloodstained shirt on a mannequin for similar display purposes.

The mannequins were formally entered in evidence at the guilt phase, remained in the courtroom (over defendant's objection) during the guilt phase and the penalty phase arguments and, along with the other exhibits, accompanied the jury into the jury room during penalty phase deliberations. Defendant complains that the "brooding omnipresence" of these "constant accusers" could only have prejudiced him. As the People observe, however, the mannequins were properly admitted in evidence as part of the case-in-chief (see *People* v. *Brown* (1988) 46 Cal.3d 432, 442-443 [250 Cal.Rptr. 604, 758 P.2d 1135]), and the trial court took reasonable steps to minimize any prejudicial effect on the jurors.

After defendant objected to the continued presence of the mannequins in the courtroom, the trial court ordered them placed so that they would not face the jury. In addition, they were removed from the jury's view during the sanity phase and most of the penalty phase. Thereafter, when defendant objected to their presence in the jury deliberation room, the court observed that, having been admitted in evidence, the mannequins properly should be

made accessible to the jury during deliberations. The court believed it might be more prejudicial to defendant to treat the mannequins differently from the other items of physical evidence, and thereby call the jury's further attention to them. The court noted that the mannequins were less objectionable than the photographs originally proposed by the People to illustrate the victims' wounds.

In sum, it is apparent the court carefully exercised its discretion in the matter with a view toward accommodating the respective interests of both parties. Although the court reasonably could have excluded the mannequins from the jury room, we find no abuse of discretion in the court's contrary ruling. (See *People* v. *Brown, supra,* 46 Cal.3d at p. 443.) The trial court was in a far better position than we to assess the potential prejudice arising from the display of such physical evidence.

H. *Reinstatement of Withdrawn Insanity Plea*

Defendant originally entered pleas of not guilty and not guilty by reason of insanity. After the competency and guilt phases, defendant successfully moved to withdraw the insanity plea. Two days later, however, defense counsel announced that defendant personally wished to reinstate his insanity plea. Counsel stated his own opinion that his client's decision was tactically unsound, because none of the psychiatrists had testified defendant was legally insane, and a sanity hearing would require him to expose his remaining psychiatric evidence, leaving nothing in reserve for the penalty phase.

The court agreed with counsel's assessment but evidently believed it had no option to deny the motion on purely tactical grounds in view of defendant's personal request. The court thereupon examined defendant, confirmed that reinstatement of the plea was defendant's free and voluntary choice, and ultimately accepted the change of plea. (Defendant explained that he had been taking medication and was "confused" at the time he withdrew his insanity plea.)

(15) Defendant now asserts the trial court erred in failing to exercise discretion in deciding whether to accept the withdrawn plea. As defendant observes, although the original choice of plea is left to the accused (§§ 1016, 1018), once a plea has been entered the court has discretion to refuse to allow him to withdraw that plea or enter a new plea. (§ 1016; see *People* v. *Cartwright* (1979) 98 Cal.App.3d 369, 386 [159 Cal.Rptr. 543].) But we think defendant is in no position to complain on appeal of the trial court's order *granting* his request to reinstate his withdrawn plea.

Initially, we observe that prior cases generally have stressed that the decision to plead, or to change or withdraw a plea, is a matter lying within

the defendant's, rather than his counsel's, ultimate control, regardless of tactical considerations. (See *People* v. *Gauze* (1975) 15 Cal.3d 709, 717 [125 Cal.Rptr. 773, 542 P.2d 1365] [defendant's personal right to refuse to enter insanity plea]; *People* v. *Rogers* (1961) 56 Cal.2d 301, 305 [14 Cal.Rptr. 660, 363 P.2d 892] [counsel's improper withdrawal of not guilty plea and entry of guilty plea to lesser offense]; *People* v. *Redmond* (1971) 16 Cal.App.3d 931, 938 [94 Cal.Rptr. 543] [defendant's qualified right to withdraw insanity plea].)

As we noted in *Gauze, supra,* 15 Cal.3d 709, under the rule in *Redmond, supra,* "a presently sane defendant may withdraw an insanity plea, provided the court is satisfied that the defendant is making a free and voluntary choice with adequate comprehension of the consequences. [Citations.] If a defendant may withdraw an insanity plea, certainly he cannot be compelled to present such a plea . . . . [¶] [He] made a free and voluntary choice with knowledge of its consequences. Neither counsel nor the court had the power to contravene that choice." (15 Cal.3d at pp. 717-718; cf. *People* v. *Frierson* (1985) 39 Cal.3d 803, 813-818 [218 Cal.Rptr. 73, 705 P.2d 396] [defendant's "fundamental right" to present diminished capacity defense].)

By analogy to *Gauze*, if a defendant cannot be compelled by counsel to present an insanity defense, he cannot be compelled by counsel to abandon one merely because counsel disagrees with the tactics of that decision. Thus, contrary to defendant's present premise, the trial court had no discretion to deny defendant's motion to reinstate his insanity plea solely because his counsel opposed that choice on tactical grounds. We conclude the court did not err in granting defendant's free and voluntary decision to reinstate his previously withdrawn insanity plea.

I. *Failure to Clarify Instructions*

At the sanity hearing, some expert testimony indicated defendant may have been a paranoid schizophrenic, while other experts characterized him as a sociopath. During the jury's deliberations as to defendant's sanity, the jury requested clarification regarding the basic definition of insanity, and the trial court correctly reread the appropriate instructions based on our decision in *People* v. *Skinner* (1985) 39 Cal.3d 765, 768-769 [217 Cal.Rptr. 685, 704 P.2d 752] (insanity constitutes inability, *resulting from mental illness*, to know nature of one's act or to know whether it was right or wrong). The jury foreman then asked whether paranoid schizophrenia was "the true definition of mental illness," and whether "the term 'sociopath' or 'antisocial personality' is not really a true mental illness?"

After consulting with counsel, and with their approval, the court advised the jury that the court could not directly answer the inquiry, and that the jury should decide the matter on the basis of the evidence in the case.

(16) Defendant now complains the court's response was inadequate because the jury could have been left with the false impression that conditions other than schizophrenia could not be considered mental illness. Defendant observes that the jury's inquiry was more in the nature of a question of law rather than fact, and that a mere review of the evidence would not inform the jury whether "mental illness" for purposes of the insanity test included conditions other than schizophrenia. According to defendant, the court should have explained to the jury that any of the mental illnesses suffered by him could satisfy the insanity standard.

The court's insanity instructions did not limit "mental illness" to schizophrenia, but allowed the jury to consider any "evidence of [defendant's] mental condition before or after the crimes." The instructions stated further that not every form of mental illness constitutes insanity, and that "if you find the defendant was suffering from a mental illness that prevented him from knowing that his acts were morally wrong, then you must find him not guilty by reason of insanity."

Although the foregoing instructions were correct, and the court's rereading of them should have sufficed to clarify the matter, it is also true that the court could have been more explicit in responding to the jury's inquiry. For example, the court might have advised the jury that "mental illness" includes all mental conditions which produce the requisite effects. But, as explained below, it is unlikely that any such clarification would have aided defendant. (See *People* v. *Kageler* (1973) 32 Cal.App.3d 738, 746 [108 Cal.Rptr. 235] [showing of prejudice required].)

As was evident from the foreman's inquiry, the jury was primarily concerned with whether a sociopathic personality could qualify as a "mental illness." A similar issue arose in *People* v. *Fields* (1983) 35 Cal.3d 329, 368-370 [197 Cal.Rptr. 803, 673 P.2d 680], where, as here, the evidence indicated the defendant was a sociopath. We held that "if the defense expert can point to no symptom, no manifestation, of defendant's condition except repeated criminal or antisocial acts, that [sociopathic] condition cannot be considered grounds for finding defendant insane. [Citation; fn. omitted]." (*Id.*, at p. 370.)

(17) Our review of the record reveals the expert testimony outlining defendant's sociopathic personality relied essentially on his antisocial and criminal behavior. Defendant cites no expert testimony relating any additional symptoms or manifestations on which a jury might find a sociopathic mental illness of the kind qualifying for an insanity verdict under the *Fields* standard (*supra*, 35 Cal.3d 329). Thus, on the present record, the trial

court's failure to further clarify the instructions could not have prejudiced defendant.

Additionally, we note that defense counsel's approval of the court's limited response to the jury's inquiry should bar defendant from contending on appeal that a more elaborate response should have been made. If defendant desired such a response, he should have proposed it. (See *People* v. *Kageler*, *supra*, 32 Cal.App.3d 738, 746; cf. *People* v. *Kimble* (1988) 44 Cal.3d 480, 503 [244 Cal.Rptr. 148, 749 P.2d 803] [defendant's duty to request clarifying instructions]; *People* v. *Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [same].) Defendant's suggestion that his counsel was incompetent in acceding to the court's response must be rejected counsel may well have had tactical reasons for not directly raising the question whether his client's sociopathic personality in fact amounted to a bona fide mental illness under *Fields*, *supra*, 35 Cal.3d 329.

3. Defendant's Absence from Conferences and Reading of Testimony

Defendant next asserts he was improperly denied the right to be personally present at various in-chambers conferences and a reading of some guilt phase testimony. (The in-chambers conferences included discussion of defendant's hostile reaction to being photographed, his potential for violence if his shackles were removed, and his self-inflicted injuries. The guilt phase testimony did not involve the three murder charges, but only the assault charge arising from the attempted robbery of victim Yoon.)

In the present case, defendant orally waived his right to be present at the various in-chambers or "bench" conferences, and at the reading of testimony. Defendant now observes that, under section 977, a *written* waiver is required if the defendant is absent "during those portions of the trial when evidence is taken before the trier of fact . . . ." Assuming the quoted language applies to the conferences and reading of testimony involved here, any error in failing to obtain a written waiver was not prejudicial.

As we stated in *People* v. *Garrison* (1989) 47 Cal.3d 746, 782 [254 Cal.Rptr. 257, 765 P.2d 419], "Although defendant's oral waiver does not comply with the writing requirement of [section 977], we find no reversible error. Defendant's absence, *even without waiver*, may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.'" (Quoting from *People* v. *Bloyd* (1987) 43 Cal.3d 333, 359-360 [233 Cal.Rptr. 368, 729 P.2d 802] [absence from court conferences and reading of testimony deemed nonprejudicial]; see also *People* v. *Douglas* (1990) 50 Cal.3d 468, 517-519 [268 Cal.Rptr. 126, 788 P.2d 640] [absence from reading of testimony nonprejudicial!]; *People* v. *Lang* (1989) 49 Cal.3d 991, 1025-1028 [264 Cal.Rptr. 386, 782 P.2d 627] [absence from jury view of murder scene, from conference regarding jury request for clarification, and from reading of testimony nonprejudicial]; *People* v. *Bittaker* (1989) 48 Cal.3d 1046, 1080-1081 [259 Cal.Rptr. 630, 774 P.2d 659] [absence from various hearings and conferences nonprejudicial]; *People* v. *Robertson* (1989) 48 Cal.3d 18, 59-62 [255 Cal.Rptr. 631, 767 P.2d 1109] [absence from penalty-reduction hearing and sentencing nonprejudicial]; *People* v. *Grant* (1988) 45 Cal.3d 829, 845-846 [248 Cal.Rptr. 444, 755 P.2d 894] [written waiver]; *People* v. *Odle* (1988) 45 Cal.3d 386, 406-407 [247 Cal.Rptr. 137, 754 P.2d 184] [waiver of right to personal presence at reading of testimony; jury provided with transcript]; *People* v. *Hovey* (1988) 44 Cal.3d 543, 585-586 [244 Cal.Rptr. 121, 749 P.2d 776] [absence from reading of testimony nonprejudicial].)

In *Garrison*, *Hovey*, and *Bloyd*, all *supra*, we held that the defendant had failed to carry his burden of demonstrating prejudice arising from his absence from the reading of testimony to the jury. As we stated in *Hovey*, "The rereading of testimony ordinarily would not be an event which bears a substantial relation to the defendant's opportunity to defend . . . ." (44 Cal.3d at p. 585.) Under the circumstances here, any error in procedure must be deemed harmless.

In addition, defendant fails to explain in what manner his presence at the various in-chambers conferences could have improved his opportunity to defend the charges against him. His suggestion that his mere presence at these hearings might have assisted the trial court in evaluating his competence to stand trial is entirely speculative and fails to carry his burden of proving prejudice. (See *Hovey*, *supra*, 44 Cal.3d at p. 585 [rejecting, as speculative, argument that jury could have been favorably influenced by watching defendant's reaction to reading of testimony].)

Defendant relies on various federal cases which he claims support a different result, but none of them requires us to adopt his position. Indeed, in several recent cases we have discussed and distinguished each of these federal cases, and we will not repeat that discussion here. (See *People* v. *Robertson*, *supra*, 48 Cal.3d at pp. 60-61; *People* v. *Grant*, *supra*, 45 Cal.3d at p. 845; *People* v. *Odle*, *supra*, 45 Cal.3d at pp. 406-407; *People* v. *Hovey*, *supra*, 44 Cal.3d at p. 585.) As the foregoing cases indicate, although some federal appellate decisions contain language to the contrary, the United States Supreme Court has never squarely held that the defendant's presence at all "critical" phases of trial is mandatory and unwaivable. Thus, assuming the proceedings at issue here should be deemed "critical," no prejudicial error occurred by reason of defendant's voluntary absence therefrom.

K. *Counsel's Absence from Reading of Testimony*

(18) In a related argument, defendant complains that he was denied the assistance of counsel when his trial counsel stipulated that the assault charge testimony could be read to the jury by the court clerk without counsel's presence. Defendant cites no case suggesting that counsel must always attend a routine reading of earlier testimony to the jury, and our cases permit counsel discretion to waive his right to be present on such occasions. (See *People* v. *Lang, supra,* 49 Cal.3d at p. 1028; *People* v. *Bloyd,* *supra,* 43 Cal.3d at pp. 360-361.) No suggestion is made that actual prejudice occurred by reason of counsel's absence, such as a misreading of testimony or misconduct by the clerk, and such prejudice cannot be presumed on a silent record.

In this regard, the situation is different from that presented in *People* v. *Hogan* (1982) 31 Cal.3d 815, 848-850 [183 Cal.Rptr. 817, 647 P.2d 93], on which defendant relies. In *Hogan*, counsel was never informed of jury requests to see various exhibits and transcripts sent to the jurors during deliberations. Here, on the other hand, counsel was aware of the jury's request and was able to make an informed decision as to the necessity of attending the proceeding. We conclude no error occurred.

IV. PENALTY PHASE CONTENTIONS

A. *Victims' Character Evidence*

During the penalty phase, the prosecutor called relatives of the three robbery-murder victims to confirm that the victims were friendly, nonaggressive persons who would not have resisted a robbery attempt. For example, victim Martin's father and victim Metal's sister each testified that the respective victim had previously agreed not to resist any such attempt. The various family witnesses also identified recent "family" type photographs of the victims to show their appearance when defendant confronted them. Thereafter, in argument, the prosecutor used the photographs to argue that each victim was a "passive" type unlikely to resist a robbery. The prosecutor cautioned the jury not to use the photos to feel sympathy for the victims or their families.

(19) The foregoing evidence was introduced to assist in establishing, as an additional aggravating circumstance of the crime (see § 190.3, factor (a)), that the nonresisting victims may have been executed without cause or provocation. The trial court ruled that evidence of the victims' likely nonresistance was relevant to show the "state of mind of these . . . victims as to what their attitude would be if they were to be robbed." As for the photos,

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the court explained that they had probative value to show "what these people look like and what [defendant] saw at the time of the killings."

Defendant argues that, despite the prosecutor's disclaimer, the "nonresistance" evidence was only marginally relevant to the penalty phase and constituted, in effect, victim impact or character evidence of the sort ruled inadmissible by the United States Supreme Court. (See *South Carolina* v. *Gathers* (1989) 490 U.S. __ [104 L.Ed.2d 876, 109 S.Ct. 2207]; *Booth* v. *Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529].) *Gathers* makes it clear that prosecutors may not exploit evidence regarding the victim's good character or background for purposes of gaining the jury's sympathy for the victim or his family. *Booth* precludes admission of evidence regarding the impact of the victim's death on his or her family. Both cases deemed the evidence at issue *irrelevant* to the sentencing decision and potentially prejudicial to the defendant's plea for a lesser punishment.

We recently encountered a similar contention in *People* v. *Carrera* (1989) 49 Cal.3d 291, 336 [261 Cal.Rptr. 348, 777 P.2d 121], where the victim's mother testified regarding her children's nonaggressive personalities. We first observed in *Carrera* that "*Booth* does not purport to bar generally the use of information about a murder victim at the penalty phase. The Supreme Court's concern lay mainly in the mandatory requirement that the entire victim-impact statement be admitted and in the risk that the jury's attention would be drawn to the personal qualities of the victim rather than to the blameworthiness of the defendant . . . . [T]he court took pains to note that '[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime' and that 'there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.' [Citation.] *Booth* thus does not alter the standard for the admission of such evidence. (See also *South Carolina* v. *Gathers* [*supra*] 490 U.S. __ [104 L.Ed.2d 876, 109 S.Ct. 2207].) The question thus remains whether the testimony was relevant, and whether its probative value outweighed any prejudicial effect." (49 Cal.3d at p. 336.)

We concluded in *Carrera* that similar evidence of the victims' nonaggressive character was relevant to support the inference "that the victims in all likelihood did not resist the robbery and the violent, fatal attack. This in turn bore directly upon the *manner* in which defendant committed the murders, and was plainly a 'circumstance of the crime' to which fair comment could be directed." (49 Cal.3d at pp. 336-337.)

Under the principles set forth in *Carrera*, the trial court here did not err in admitting evidence of the victims' nonaggressive character traits. (See also *People* v. *Douglas, supra,* 50 Cal.3d 468, 536 ["In our view, neither

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Booth nor *Gathers* bars comments on the crime from the victims' perspective, or brief references to the victims or their families. [Citations.]"].)

Carrera, supra, 49 Cal.3d 291, did not suggest, however, that family photographs would be relevant to establish the nonresisting character of the victims. Moreover, defendant points out that some family members additionally testified to such irrelevant matters as the victims' capacity for work, desire to save money or return to school, or vegetarian eating habits. Our review of the record indicates, however, that except for a few isolated references of this kind (to which no objection was made), the family members' testimony was essentially confined to the victims' probable nonresistance to being robbed.

Even if we were to conclude that the introduction of the photographs and family member testimony violated the proscriptions of *Gathers* and *Booth*, we would find beyond a reasonable doubt that any such error did not contribute to the sentencing determination. (*Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065].) In our view, the foregoing evidence could not have diverted the jury from its task of determining the appropriate punishment. (See *People* v. *Douglas, supra,* 50 Cal.3d at p. 537.)

B. *Evidence of Prior Unadjudicated Crimes*

The prosecutor introduced evidence of four prior unadjudicated crimes as aggravating circumstances relevant to sentencing. (§ 190.3, factor (b).) These crimes included another robbery-murder (victim Martin), two assaults and a rape. Defendant contends that introduction of such evidence denied him due process and equal protection, and resulted in an unreliable sentence. He acknowledges that we rejected similar arguments in *People* v. *Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480] [maj. opn. by Grodin, J.], but he urges us to reconsider that ruling because of the "gross superficiality" of our analysis in that case.

We have had many opportunities to reconsider *Balderas* (*supra,* 41 Cal.3d 144), but have consistently, and without dissenting vote, declined to do so. (See, e.g., *People* v. *Robertson, supra,* 48 Cal.3d 18, 42; *People* v. *Malone, supra,* 47 Cal.3d 1, 48; *People* v. *McDowell* (1988) 46 Cal.3d 551, 569 [250 Cal.Rptr. 530, 758 P.2d 1060]; *People* v. *Hamilton* (1988) 46 Cal.3d 123, 144 [249 Cal.Rptr. 320, 756 P.2d 1348]; *People* v. *Grant, supra,* 45 Cal.3d 829, 859; *People* v. *Belmontes* (1988) 45 Cal.3d 744, 808 [248 Cal.Rptr. 126, 755 P.2d 310]; *People* v. *Dyer* (1988) 45 Cal.3d 26, 76 [246 Cal.Rptr. 209, 753 P.2d 1]; *People* v. *Gates* (1987) 43 Cal.3d 1168, 1202 [240 Cal.Rptr. 666, 743 P.2d 301].) Defendant, characterizing these cases as the

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"dubious progeny" of *Balderas,* and lacking in any "reasoned analysis," insists that new arguments exist to support reconsideration of that case. We disagree.

Defendant argues (1) the jury which found him guilty of the charged offenses could not be fair and unbiased in adjudging his guilt of other unadjudicated crimes at the penalty phase; (2) "other crimes" evidence is inherently prejudicial, diverting the penalty phase jury's attention from its proper task; (3) the jury cannot realistically be expected to ignore "other crimes" evidence not found true beyond a reasonable doubt; (4) some other state courts favor a rule contrary to *Balderas*; and (5) equal protection principles require treating all defendants equally, yet those who are separately prosecuted for the alleged aggravating circumstances are given rights (e.g., an impartial and unanimous jury) not available when "other crimes" evidence is merely "presented" to the penalty phase jury.

(20) Contrary to defendant's assumption, we think *Balderas* and its progeny adequately considered and rejected the foregoing arguments. As *Balderas* observes, each of these contentions is overshadowed by the state's legitimate interest in prosecuting capital cases before a single jury, and in allowing that jury to weigh and consider the defendant's prior criminal conduct in determining penalty, so long as reasonable steps are taken to assure defendant a fair and impartial penalty trial. (See *People* v. *Balderas, supra,* 41 Cal.3d at pp. 204-205.) We decline to reconsider that rationale here.

(21) Defendant observes that criminal charges regarding his prior rape offense had been twice dismissed, thereby barring further prosecution (§ 1387). Defendant contends this bar likewise extended to use of the evidence as an aggravating circumstance.

In *People* v. *Heishman, supra,* 45 Cal.3d 147, 193, we explained that dismissal of charges is not the equivalent of an outright acquittal, because it is "not based on any judicial determination with respect to the truth or falsity of the charge . . . ." Similarly, we have held that evidence of offenses barred by the statute of limitations is nonetheless admissible as aggravating evidence at the penalty phase. (*People* v. *Robertson, supra,* 48 Cal.3d at pp. 43-44; *People* v. *Jennings* (1988) 46 Cal.3d 963, 981-982 [251 Cal.Rptr. 278, 760 P.2d 475].) The rationale of those cases applies here.

C. *Extreme Mental or Emotional Disturbance*

(22) In accordance with section 190.3, factor (d), the jury was instructed to consider "[w]hether or not the offense was committed while the

defendant was under the influence of extreme mental or emotional disturbance." (CALJIC former No. 8.84.1.) Defendant asserts that the foregoing instruction, by referring to an "extreme" condition, indicated that any "lesser disturbance" would not be a possible mitigating factor. He fears this instruction may have induced the jury to ignore the substantial evidence indicating he was suffering from some type of mental illness. We cannot agree.

First, it should be noted that the trial court also instructed the jury that it was to consider "any other circumstance which extenuates the gravity of the crime . . . ." (§ 190.3, factor (k); CALJIC former No. 8.84.1.) In *People* v. *Ghent, supra,* 43 Cal.3d 739, we concluded that this "'catchall' provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense." (*Id.* at p. 776.) In subsequent cases, we have reaffirmed our *Ghent* holding. (E.g., *People* v. *Hunter* (1989) 49 Cal.3d 957, 987-988 [264 Cal.Rptr. 367, 782 P.2d 608]; *People* v. *Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55, 763 P.2d 906]; *People* v. *Caro* (1988) 46 Cal.3d 1035, 1064 [251 Cal.Rptr. 757, 761 P.2d 680]; *People* v. *Brown, supra,* 46 Cal.3d at pp. 457-458; *People* v. *Babbitt* (1988) 45 Cal.3d 660, 720-721 [248 Cal.Rptr. 69, 755 P.2d 253]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 297 [247 Cal.Rptr. 1, 753 P.2d 1052].)

The trial court went even further, however, and modified the factor (k) instruction to include consideration of "any sympathetic or other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." (See *People* v. *Easley* (1983) 34 Cal.3d 858, 876-878, & fn. 10 [196 Cal.Rptr. 309, 671 P.2d 813].) Moreover, the court instructed the jury that it should disregard any other conflicting instruction.

Although in closing argument the prosecutor asserted that defendant's mental state evidence did not disclose any "extreme" condition, he did not advise the jury that such evidence was wholly irrelevant to its penalty decision, and defense counsel confirmed that the evidence could be deemed a mitigating circumstance under factor (k). We conclude that the jury was properly instructed in this regard.

D. *Defendant's Mental Condition and Age as Aggravating Factors*

The court gave the standard instructions setting forth the list of aggravating and mitigating factors. (CALJIC former No. 8.84.1.) Defendant asserts the instructions were inadequate in failing to explain that certain factors, including defendant's mental condition and age, must be deemed mitigating

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ones. He maintains the prosecutor improperly labelled defendant's sociopathic condition and age (41) as aggravating factors.

(23) We have held the standard instructions adequate despite their failure to identify the aggravating or mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case." (*People* v. *Jackson* (1980) 28 Cal.3d 264, 316 [168 Cal.Rptr. 603, 618 P.2d 149]; see *People* v. *McLain* (1988) 46 Cal.3d 97, 118 [249 Cal.Rptr. 630, 757 P.2d 569].)

As for the prosecutor's remarks, no error or misconduct appears: At no time did the prosecutor argue that defendant's mental condition should be deemed an aggravating factor. Our review of the record indicates that, in context, the prosecutor was simply observing that defendant's sociopathic condition, and the resulting antisocial conduct, should not be deemed a mitigating factor. (See *People* v. *Fields, supra,* 35 Cal.3d 329, 369-370.) (24) Although he did argue that defendant's age should be deemed aggravating, that argument was interwoven with the theme that, unlike an extremely young or old person, defendant was a mature, experienced individual who made a "well-considered decision" to undertake the various crimes he committed. Such an argument is a legitimate one. (See *People* v. *Lucky, supra,* 45 Cal.3d at p. 302.)

As *Lucky* observes, the statutory word "age" "is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (45 Cal.3d at p. 302.) We decline defendant's invitation to reconsider *Lucky*. (See *People* v. *Douglas, supra,* 50 Cal.3d 468, 538-539; *People* v. *Caro, supra,* 46 Cal.3d at p. 1062; *People* v. *McLain, supra,* 46 Cal.3d at p. 111.)

E. *Lack of Findings*

(25) Defendant next argues the 1978 death penalty law is unconstitutional for failure to require the jury to set forth written findings regarding the various aggravating factors it relied on in imposing death. We rejected this constitutional objection several years ago, and we discern no compelling reason for reconsidering our position now. (*People* v. *Frierson* (1979) 25 Cal.3d 142, 178-180 [158 Cal.Rptr. 281, 599 P.2d 587]; see *People* v. *Belmontes, supra,* 45 Cal.3d at p. 805; *People* v. *Gates, supra,* 43 Cal.3d at p. 1203; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Jackson, supra,* 28 Cal.3d at pp. 316-317.) The federal courts have likewise declined to require such findings as a matter of

constitutional law. (*Harris* v. *Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, reversed and remanded on other grounds in *Pulley* v. *Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871]; see *Hildwin* v. *Florida* (1989) 490 U.S. 638, __[104 L.Ed.2d 728, 731-732, 109 S.Ct. 2055] [6th Amend. does not require Florida's advisory jury to specify aggravating factors].)

Defendant, observing that other convicted felons are entitled to trial *court* findings specifying the aggravating facts which justify an increased sentence (see § 1170, subd. (c)), argues that the lack of *jury* findings in capital cases offends equal protection principles. But the defendants in these two situations are not similarly situated. Requiring the trial judge to specify his or her reasons for making an increased sentencing decision is hardly comparable to requiring 12 jurors to recite the aggravating facts which each of them believed justified a death penalty. The California death penalty law does impose on the trial court in a capital case, in ruling on the automatic motion to modify sentence (see § 190.4, subd. (e)), the obligation to specify its reasons. This section fully satisfies any legitimate equal protection demands.

F. *Unanimity as to Uncharged Offenses*

(26) Defendant next contends the court erred in failing to instruct the jury that it must unanimously find any uncharged offenses occurred beyond a reasonable doubt, before those offenses could be deemed aggravating circumstances under section 190.3, factor (b). We rejected that argument in *People* v. *Ghent*, *supra*, 43 Cal.3d at pages 773-774. (See also *People* v. *Johnson*, *supra*, 47 Cal.3d at p. 1250; *People* v. *Jennings*, *supra*, 46 Cal.3d at p. 988; *People* v. *Miranda* (1987) 44 Cal.3d 57, 90 [241 Cal.Rptr. 594, 744 P.2d 1127].)

Defendant urges we reconsider *Ghent*, *supra*, 43 Cal.3d 739. He relies on *Johnson* v. *Mississippi* (1988) 486 U.S. 578 [100 L.Ed.2d 575, 108 S.Ct. 1981], but that case seems wholly inapposite. In *Johnson*, the penalty jury had considered a prior criminal offense *which was later set aside*. The court reversed the death judgment on the basis the jury may have relied on the invalid conviction. Nothing in *Johnson* indicated a requirement the jury unanimously agree that a particular offense was proved beyond a reasonable doubt.

As we stated in *Ghent*, "we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." (43 Cal.3d at p. 774.)

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G. *Constitutionality of Sentencing Law*

Defendant asserts various constitutional challenges to the California sentencing law and procedure; he acknowledges that our prior decisions have rejected all these challenges. (See *People* v. *Jennings*, *supra*, 46 Cal.3d at p. 992; *People* v. *Bonin* (1988) 46 Cal.3d 659, 698-704 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People* v. *Miranda*, *supra*, 44 Cal.3d 57, 102-107; *People* v. *Rodriguez*, *supra*, 42 Cal.3d at pp. 777-779; *People* v. *Jackson*, *supra*, 28 Cal.3d at pp. 315-317; *People* v. *Frierson*, *supra*, 25 Cal.3d at pp. 172-188.) Defendant states no compelling reasons which might induce us to reconsider these decisions. (See also *Boyde* v. *California* (1990) 494 U.S. __ [108 L.Ed.2d 316, 110 S.Ct. 1190].)

H. *Trial Court Consideration of Victim Impact and Character Evidence*

After the jury rendered its verdict, and after the trial court denied defendant's automatic motion to modify the death verdict (§ 190.4, subd. (e)), but before formal sentencing, various relatives of the victims testified regarding personal characteristics of the victims, and expressed their wish that the death sentence be imposed.

For example, victim Ariza's mother testified that her son had been a "promising and decent young man," and a "college student working to help pay his way through college." She testified that his death caused her family "untold grief, pain and suffering," and she urged that the death penalty be imposed. Ariza's father likewise attested to his suffering over his son's death, which led to his alcoholism, drunk driving conviction, loss of family and job. Similar, though less dramatic, testimony was elicited from the relatives of victims Rea, Metal, and Martin. Before sentencing defendant, the trial court indicated it had "certainly considered" the foregoing testimony.

As we have previously noted herein in connection with a similar argument involving the jury's consideration of evidence regarding the victims' nonaggressive characters, recent decisions of the United States Supreme Court deem most "victim impact" and "victim character" evidence irrelevant to the sentencing decision and potentially prejudicial to the defendant's plea for a lesser punishment. (See *South Carolina v. Gathers*, *supra*, 490 U.S. __ [104 L.Ed.2d 876] [prosecutor's argument regarding victim's good character]; *Booth* v. *Maryland*, *supra*, 482 U.S. 496 [victim impact statements].)

Neither case involves the admissibility of victim impact or character evidence at a sentencing hearing by the trial court following the jury's

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verdict. (See *People* v. *Siripongs* (1988) 45 Cal.3d 548, 585-586, fn. 12 [247 Cal.Rptr. 729, 754 P.2d 1306].) Thus, we have stated that "the Eighth Amendment considerations" expressed in *Booth/Gathers* "are not implicated" in a modification hearing under section 190.4. (*People* v. *Jennings*, *supra*, 46 Cal.3d at pp. 994-995; see *People* v. *Lang*, *supra*, 49 Cal.3d at pp. 1043-1044.) Nonetheless, as we explained in *Jennings*, that section does limit the court's consideration to the evidence that was available to the jury. (46 Cal.3d at p. 994.)

(27) As previously noted, the trial court announced its denial of the modification motion *before* hearing the family member testimony discussed above. After announcing its ruling, but before formally sentencing defendant, the court then permitted the family members to speak. Although the court indicated it had "considered" the family member testimony, it then outlined the considerable aggravating factors and evidence that it deemed supportive of a death sentence. The family victim testimony was not mentioned.

A similar situation occurred in *Siripongs*, *supra*, where we observed that the victim impact evidence could not have affected the trial court's ruling because the court had denied the motion before hearing the challenged testimony. (See *People* v. *Siripongs*, *supra*, 45 Cal.3d at pp. 585-586, fn. 12; see also *People* v. *Lang*, *supra*, 49 Cal.3d at p. 1044 [trial court's consideration of victim impact evidence did not affect ruling denying modification]; *People* v. *Adcox*, *supra*, 47 Cal.3d at p. 274 [same]; *People* v. *Jennings*, *supra*, 46 Cal.3d at p. 995 [same].)

As we observed in *Lang*, *supra*, 49 Cal.3d 991, although the trial court did state it had read and "considered" a presentence report containing the victim impact evidence, the court in ruling on the motion referred only to the evidence presented to the jury and did not indicate his decision was influenced by that report or its contents.

The situation presented here and in *Lang* is quite different from that in *People* v. *Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892], where the trial court in denying the automatic motion for modification of sentence expressly stated it was relying on facts found in an inadmissible probation report. In *Lewis*, the opinion orders a limited remand for another modification hearing. We conclude that under the circumstances in the present case, no such remand is required.

I. *Proportionality Review*

Defendant asserts that we should undertake a comparative "intercase" sentence review to assure that his death sentence is not disproportionate in

light of the underlying facts. We have uniformly declined to undertake such review and see no reason to reconsider our holdings. (See, e.g., *People* v. *Lang*, *supra*, 49 Cal.3d at p. 1045; *People* v. *Burton* (1989) 48 Cal.3d 843, 873 [258 Cal.Rptr. 184, 771 P.2d 1270]; *People* v. *Johnson*, *supra*, 47 Cal.3d at p. 1253.)

V. CONCLUSION

The judgment is affirmed in its entirety.

Panelli, J., Eagleson, J., Kennard, J., and Arabian, J., concurred.

MOSK, J.—I dissent.

Defendant contends that the judgment must be reversed: the jury's determination that he was mentally competent cannot stand without offense to the due process clause of the Fourteenth Amendment to the United States Constitution. The majority reject the claim. After review, I am of the opinion that their analysis is erroneous and their conclusion unsound.

Prior to trial, on defense counsel's motion the court declared a doubt about defendant's mental competence and instituted proceedings on the question under the authority of the statutory scheme codified in Penal Code section 1367 and following. One of the provisions of that scheme is Penal Code section 1369, subdivision (f) (hereafter section 1369(f)), which allocates the burden of proof to the defendant: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." The parties introduced substantial, but sharply conflicting, evidence on the issue. The jury was instructed in accordance with section 1369(f). It subsequently returned a verdict finding defendant mentally competent.

The statutory scheme on mental competence is fundamentally flawed in its allocation of the burden of proof to the defendant, and therefore cannot support the verdict returned under its "authority."

The due process clause prohibits the conviction of a person for a crime if he does not satisfy all the elements of the offense. (See, e.g., *Mullaney* v. *Wilbur* (1975) 421 U.S. 684, 691-704 [44 L.Ed.2d 508, 514-523, 95 S.Ct. 1881].) Further, it bars conviction except on proof beyond a reasonable doubt by the prosecution of each of the elements. (E.g., *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375, 90 S.Ct. 1068].)

Similarly, the due process clause prohibits the conviction of a person for a crime if he is not mentally competent. (See, e.g., *Pate* v. *Robinson* (1966)

383 U.S. 375, 378 [15 L.Ed.2d 815, 818, 86 S.Ct. 836].) By parity of reasoning, it bars conviction except on proof beyond a reasonable doubt by the prosecution that the defendant is in fact mentally competent.

To be sure, the due process clause does not require the prosecution to prove the defendant sane beyond a reasonable doubt. (*Mullaney* v. *Wilbur*, *supra*, 421 U.S. at pp. 705-706 [44 L.Ed.2d at pp. 523-524] (conc. opn. of Rehnquist, J.) [discussing *In re Winship*, *supra*, 397 U.S. 358 and *Leland* v. *Oregon* (1952) 343 U.S. 790 (96 L.Ed. 1302, 72 S.Ct. 1002)].) But an insanity defense is apparently not constitutionally mandated. (*Ake* v. *Oklahoma* (1985) 470 U.S. 68, 91 [84 L.Ed.2d 53, 71, 105 S.Ct. 1087] (dis. opn. of Rehnquist, J.) [stating that "[i]t is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant"].) Further, it is an affirmative defense and as such comes into play only after the prosecution has proved the existence of all the elements of the crime charged beyond a reasonable doubt. (See *Mullaney* v. *Wilbur*, *supra*, 421 U.S. at pp. 705-706 [44 L.Ed.2d at pp. 523-524] (conc. opn. of Rehnquist, J.).)

The foregoing analysis, however, does not affect the conclusion that the due process clause does indeed require the prosecution to prove the defendant mentally competent beyond a reasonable doubt. Mental competence *is* in fact constitutionally mandated. Further, mental incompetence is *not* an affirmative defense that becomes operative only after proof of the crime at trial. "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." (*Drope* v. *Missouri* (1975) 420 U.S. 162, 171 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896].)

Therefore, the statutory scheme for proceedings on mental competence is fundamentally flawed in its allocation of the burden of proof to the defendant, and as a result cannot support the verdict returned under its "authority" in this case.[1]

Accordingly, I would reverse the judgment in its entirety.

BROUSSARD, J.—I respectfully dissent.

As the majority opinion recognizes, this case presents a significant constitutional issue that has not yet been resolved by this court or by the United

[1]For purposes here, I need not and do not consider the separate question of the constitutionally proper allocation of the burden *of producing evidence*. (See generally 2 ABA Standards for Criminal Justice, std. 7-4 . 38 (2d ed. 1986) p. 7 . 3208; *id.*, Commentary, pp. 7 . 213-7 . 3215.)

States Supreme Court and that has divided the lower federal courts and other state courts. The question is: When a doubt has arisen with respect to a criminal defendant's competency to stand trial, is it constitutionally permissible for a state to apply a procedural rule that presumes the defendant is competent and that places on the defendant the burden of proving that he is incompetent? (See Pen. Code, § 1369, subd. (f).)[1]

I disagree with the majority's conclusion that the challenged procedural rule is constitutional. Although the majority accurately note that "[t]he cases from other state and federal jurisdictions are in conflict on the constitutional propriety of placing on the defendant the burden of proving his own incompetence" (see maj. opn., *ante*, p. 882), the opinion fails to point out that the overwhelming majority of decisions, both federal and state, that have addressed the issue have held that in a competency proceeding it is the prosecution, rather than the defendant, that must properly bear the burden of proof on the competency issue. (See, e.g., *United States* v. *DiGilio* (3d Cir. 1976) 538 F.2d 972, 986-989; *United States* ex rel. *Bilyew* v. *Franzen* (7th Cir. 1982) 686 F.2d 1238, 1244-1245; *Brown* v. *Warden, Great Meadow Correctional Facility* (2d Cir. 1982) 682 F.2d 348, 351-354; *United States* v. *Makris* (5th Cir. 1976) 535 F.2d 899, 905-906; *People* v. *McCullum* (1977) 66 Ill.2d 306 [362 N.E.2d 307, 310-311]; *State* v. *Jones* (S.D. 1987) 406 N.W.2d 366, 367-370; *State* v. *Bertrand* (1983) 123 N.H. 719 [465 A.2d 912, 916-917]; *Diaz* v. *State* (Del. 1986) 508 A.2d 861, 863-864; *State* v. *Heger* (N.D. 1982) 326 N.W.2d 855, 857-858; *Commonwealth* v. *Crowley* (1984) 393 Mass. 393 [471 N.E.2d 353, 357-358]; *Jolley* v. *State* (1978) 282 Md. 353 [384 A.2d 91, 98]; *contra Lowenfield* v. *Phelps* (5th Cir. 1987) 817 F.2d 285, 294-295, affd. on other grounds (1988) 484 U.S. 231 [98 L.Ed.2d 568, 108 S.Ct. 546]; *State* v. *Chapman* (1986) 104 N.M. 324 [721 P.2d 392, 395]; *State* v. *Pruitt* (1984) 18 Ohio.App.3d 50 [480 N.E.2d 499, 509] (separate conc. opns. of Markus, J., and Nahra, J.); *Wallace* v. *State* (1981) 248 Ga. 255 [282 S.E.2d 325, 330]; *State* v. *Aumann* (Iowa 1978) 265 N.W.2d 316, 319-320.) While not all of the cases in the majority line are explicitly based on constitutional principles, a substantial number of the decisions clearly rest on a constitutional foundation. (See *DiGilio*, *supra*, 538 F.2d at p. 988; *Bilyew*, *supra*, 686 F.2d at pp. 1244-1245; *McCullum*,

[1]Penal Code section 1369 provides in relevant part: "A trial by court or jury of the question of mental competence shall proceed in the following order: . . . [¶] (f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous."

Pursuant to this provision, the competency jury in the present case was instructed that "[t]he defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of mental disorder or developmental disability."

supra, 362 N.E.2d at pp. 310-311; *Jones*, *supra*, 406 N.W.2d at pp. 369-370; *Bertrand*, *supra*, 465 A.2d at p. 916.) Thus, the majority, in sustaining the constitutional validity of a statutory provision that requires a defendant to bear the burden of proving his own incompetency, have chosen to align our court with the minority of courts that have addressed the issue.

I acknowledge, of course, that our resolution of the constitutional question cannot properly be based on a head count of what other courts have done, but must rest on our own considered evaluation of the merits of defendant's constitutional claim. When the substance of the constitutional considerations underlying the out-of-state authorities is carefully analyzed, however, in my view it is clear that the opinion's conclusion cannot be sustained.

As the majority opinion recognizes, the constitutional analysis must begin with the United States Supreme Court decisions in *Pate* v. *Robinson* (1966) 383 U.S. 375 [15 L.Ed.2d 815, 822, 86 S.Ct. 836] and *Drope* v. *Missouri* (1975) 420 U.S. 162 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896]. In *Pate* and *Drope*, the United States Supreme Court established that the federal due process clause not only prohibits a state from convicting a defendant who is not legally competent to stand trial, but also requires a state to adopt and to apply procedures that are fully adequate to protect this constitutional right. (See *Pate*, *supra*, 383 U.S. at p. 378 [15 L.Ed.2d at p. 818]; *Drope*, *supra*, 420 U.S. at pp. 171-172 [43 L.Ed.2d at pp. 112-113].) The question before us is whether a state procedure that places the burden of proof at the competency hearing on the defendant properly protects this crucial right.

In *United States* v. *DiGilio*, *supra*, 538 F.2d 972 (hereafter *DiGilio*), the Third Circuit identified two distinct considerations that render a rule placing the burden of proof of incompetency on a defendant constitutionally impermissible. The first consideration is the basic unfairness of placing the burden of proof on a defendant whose incompetence, if actually present, will impair his ability to adequately assist in the task of meeting his burden of proof. With respect to this point, the *DiGilio* court noted that in *Pate* v. *Robinson*, *supra*, 383 U.S. 375, the United States Supreme Court had rejected the notion that a defendant, as to whom a question of incompetency had arisen, could waive his right to have his competency determined prior to trial. The Supreme Court reasoned in *Pate* that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." (*Pate*, *supra*, 383 U.S. at p. 384 [15 L.Ed.2d at p. 821].) The *DiGilio* court explained that "[i]t is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence

that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." (*DiGilio*, *supra*, 538 F.2d at p. 988.)

The second consideration emphasized by the *DiGilio* court is that a rule that places the burden of proof on the defendant means that when the evidence on the competency issue is equally balanced, the trier of fact must resolve the issue in favor of competency, thereby subjecting a defendant to a criminal proceeding in which he faces serious sanctions even when the defendant is as likely to be incompetent as competent. As the *DiGilio* court put it: "[W]hat we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the [Supreme] Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, see *Drope* v. *Missouri*, *supra*, 420 U.S. at 171-172, 95 S.Ct. 896, the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant." (*DiGilio*, *supra*, 538 F.2d at p. 988, fn. omitted.)

In rejecting defendant's constitutional claim in the present case, the majority opinion relies almost entirely on the fact that the United States Supreme Court, in *Leland* v. *Oregon* (1952) 343 U.S. 790, 798-799 [96 L.Ed. 1302, 1308-1309, 72 S.Ct. 1002] (hereafter *Leland*) and *Rivera* v. *Delaware* (1976) 429 U.S. 877 [50 L.Ed.2d 160, 97 S.Ct. 226] (hereafter *Rivera*), has held that it is not unconstitutional for a state to impose on a defendant the burden of proof with respect to an insanity defense. Like the minority line of decisions it follows, however, the majority opinion fails to recognize that the *Leland* and *Rivera* decisions have no bearing whatsoever on either of the two constitutional problems identified in *DiGilio*, *supra*, 538 F.2d 972.

To begin with, the competency issue and the insanity issue deal with a defendant's mental state at two entirely different points in time. As one commentator has explained: "[T]he issue of incompetency to stand trial must be distinguished from . . . the defense of insanity in a criminal trial, where the question is whether the defendant's mental condition *at the time of the criminal act* was such that he should not be held responsible for his conduct. The question of competency to stand trial relates rather to the appropriateness of conducting the criminal proceeding in light of the defendant's *present* inability to participate effectively." (Note, *Incompetency to Stand Trial* (1967) 81 Harv.L.Rev. 454, italics added.)

In the insanity context, a rule placing the burden of proof of insanity on the defendant imposes that burden on a defendant who, by necessity, must

have already been found to be presently competent to assist in his own defense. When a defendant is presently competent, there may be no greater unfairness in placing the burden on the defendant to prove that he was insane at the time of the offense than there is in requiring such a defendant to bear the burden of proof with regard to other affirmative defenses.

In the competency context, by contrast, the defendant's present ability to understand the proceeding and assist his counsel is the very matter in doubt, raising the fundamental problem of the potential unfairness of a rule that requires an incompetent defendant to shoulder the burden of proof on the crucial question of competency. Thus, the Supreme Court's decisions in *Leland*, *supra*, 343 U.S. 790, and *Rivera*, *supra*, 429 U.S. 877, holding that it is constitutionally permissible to place on a presently competent defendant the burden of establishing an insanity defense, provide no logical or legal support for the proposition that it is constitutionally permissible to place the burden of proof on a defendant who may be presently incompetent to assist his counsel in meeting that burden.

Furthermore, *Leland*, *supra*, 343 U.S. 790, and *Rivera*, *supra*, 429 U.S. 877, are equally unresponsive to the second constitutional concern identified in *DiGilio*, *supra*, 538 F.2d 972, 988, namely, that a rule placing the burden of proof of competency on the defendant violates due process because it creates too great a risk of an unreliable competency determination by permitting a defendant to be found competent and subjected to trial even when the evidence of competence does not outweigh the evidence of incompetence.

In *Leland*, *supra*, 343 U.S. 790, and *Rivera*, *supra*, 429 U.S. 877, the burden of proof question arose in the context of the proper allocation of burdens of proof between the prosecution and the defense with regard to the elements of an offense, on the one hand, and affirmative defenses, on the other. In *Leland* and *Rivera*, and in the more recent decision in *Martin* v. *Ohio* (1987) 480 U.S. 228 [94 L.Ed.2d 267, 107 S.Ct. 1098], the United States Supreme Court reaffirmed the constitutionality of the general common law rule placing the burden of proving an affirmative defense on the defendant. These cases simply hold that so long as the prosecution is required to meet its burden of proving all the elements of a criminal offense beyond a reasonable doubt, the Constitution does not preclude a state from placing on the defendant the burden of proving an affirmative defense.

In the present case, unlike *Leland*, *supra*, 343 U.S. 790, *Rivera*, *supra*, 429 U.S. 877, or *Martin* v. *Ohio*, *supra*, 480 U.S. 228, the burden of proof question does not involve a matter of allocating burdens with respect to an element of an offense or an affirmative defense. While it is true, as the

opinion observes, that a "defendant's competence to stand trial . . . is no more an element of the crime charged than is his sanity" (see maj. opn. *ante*, p. 884), it is equally clear that the question of a defendant's competency to stand trial is not an affirmative defense. Unlike an affirmative defense, the competency issue is not one that a defendant may raise or decline to raise at his own option. Once a question as to the defendant's competency has arisen, the controlling Supreme Court decisions establish that, as a constitutional matter, the trial court *must* hold a hearing on the question even if the defendant objects and wishes to proceed without such a hearing, and the trial of the defendant *cannot* go forward unless it is properly determined that defendant is competent to stand trial. (See, e.g., *Pate* v. *Robinson*, *supra*, 383 U.S. 375, 384 [15 L.Ed.2d 815, 821]; *People* v. *Marks* (1988) 45 Cal.3d 1335, 1340 [248 Cal.Rptr. 874, 756 P.2d 260].)

Contrary to the implicit suggestion of the majority opinion, the fact that a defendant's competence is not an element of an offense does *not* mean that it is constitutionally permissible to place the burden of proof of that issue on the defendant rather than on the prosecution.[2] There are numerous matters that are not elements of a criminal offense on which the prosecution, rather than the defendant, bears the burden of proof. For example, although the voluntariness or involuntariness of a confession is not an element of a crime, the Constitution requires that the prosecution, rather than the defense, bear the burden of proving voluntariness by a preponderance of the evidence. (*Lego* v. *Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2d 618, 627-628, 92 S.Ct. 619].)[3] Similarly, although the statute of limitations is not an element of a crime, the prosecution, rather than the defense, bears the burden of proving by a preponderance of the evidence that the alleged crime was committed within the applicable limitations period. (See, e.g., *People* v. *Zamora* (1976) 18 Cal.3d 538, 565, fns. 26, 27 [134 Cal.Rptr. 784, 557 P.2d 75]. See generally 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 372, p. 426.)

Although the Supreme Court has not yet expressly resolved the question whether a state may properly impose the burden of proof on the competen-

[2] Because a defendant's competency to stand trial is not an element of a criminal offense, most decisions have held that it is constitutionally permissible for a state to require the prosecution to prove competence only by a preponderance of the evidence, rather than beyond a reasonable doubt. (See, e.g., *DiGilio*, *supra*, 538 F.2d 972, 988.) Nonetheless, as explained above, the great majority of decisions have held that the prosecution, rather than the defendant, must bear the burden of proof on this matter.

[3] In *Twomey*, the court stated: "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." (*Twomey*, *supra*, 404 U.S. 477, 489 [30 L.Ed.2d 618, 627].)

cy issue on the defendant rather than on the prosecution, its past rulings on the competency question are inconsistent with a rule placing the burden of proving incompetency on the defendant. As noted above, in *Pate* v. *Robinson*, *supra*, 383 U.S. 375, the court expressly rejected the notion that a defendant whose competency is in question may "waive" the incompetency issue, holding that once a question as to a defendant's competency to stand trial has arisen, the trial court has a constitutional obligation to ensure that the trial does not go forward until it is properly determined that the defendant is competent to stand trial. (See also *Drope* v. *Missouri*, *supra*, 420 U.S. 162, 181 [43 L.Ed.2d 103, 118-119].) If the competency of the defendant is so vital and fundamental to a fair trial that neither a defendant nor his counsel may waive the point or consent to a trial without a proper determination of the issue, it is clearly impermissible for a state to permit a defendant to be found competent to stand trial simply on the basis of the defendant's own failure to prove incompetency rather than on the basis of affirmative proof demonstrating that the defendant is competent. (See Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems* (1977) 45 U.Chi.L.Rev. 21, 57.) As the *DiGilio* court put it, in light of the Supreme Court's emphasis of the fundamental importance of a competent defendant to the basic fairness of the entire trial process, "[e]vidence showing competency must be more persuasive than that showing incompetency" before a defendant may properly be found competent to stand trial. (*DiGilio*, *supra*, 538 F.2d 972, 988.)

To put the matter in slightly different terms, the challenged California procedure is unconstitutional because it places too great a risk on the defendant of an erroneous determination of competency. As a number of United States Supreme Court decisions explain, procedural rules assigning the burden of proof on particular issues, or establishing the appropriate standard of proof applicable to a given issue, reflect "a societal judgment about how the risk of error should be distributed between the litigants." (*Santosky* v. *Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 607, 102 S.Ct. 1388]; see, e.g., *Addington* v. *Texas* (1979) 441 U.S. 418, 423-425 [60 L.Ed.2d 323, 329-331, 99 S.Ct. 1804]; *Mullaney* v. *Wilbur* (1975) 421 U.S. 684, 700-701 [44 L.Ed.2d 508, 514-523, 95 S.Ct. 1881].) In *Speiser* v. *Randall* (1958) 357 U.S. 513 [2 L.Ed.2d 1460, 78 S.Ct. 1332], a civil case, the court explained the practical consequences and policy considerations implicit in the assignment of the burden of proof. The *Speiser* court stated: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. [Citations.] There is always in litigation a margin of error, representing error in factfinding . . . . *Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other*

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std. 7-4.8, pp. 7.213 to 7.215.)

party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. *Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence* and 'convincing the factfinder of his guilt." (357 U.S. at p. 525 [2 L.Ed.2d at pp. 1472-1473], italics added.) In a competency proceeding, the risk of an erroneous determination of competency can be properly contained within permissible constitutional limits only if the prosecution is required to bear the burden of proving, by at least a preponderance of the evidence, that the defendant is competent to stand trial.

In sum, the majority opinion's reliance on the *Leland*, *supra*, 343 U.S. 790, and *Rivera*, *supra*, 429 U.S. 877, decisions is totally misplaced. Those cases simply have no bearing on the distinct constitutional problems posed by a state procedure that places the burden of proof in a competency proceeding on the defendant.

In addition to its reliance on *Leland*, *supra*, 343 U.S. 790, and *Rivera*, *supra*, 429 U.S. 877, the opinion suggests that "sound practical and policy considerations" support a rule placing the burden of proving incompetency on the defendant because the defendant and his counsel can be expected to have better access than the People to the facts relevant to the competency inquiry. (See maj. opn. *ante*, p. 885.) While the question of access to the facts of incompetency is a relevant consideration which may well justify placing the initial *burden of production*, i.e., the burden of going forward with evidence, on the defendant, it cannot justify a rule of law placing *the burden of proof* on the defendant, a rule of law that as just explained permits the trier of fact to find the defendant competent even when the evidence of competence does not outweigh the evidence of incompetence.[4] Furthermore, to the extent that the majority's argument purports to suggest that a rule placing the burden of proving competency on the prosecution is "impractical" in light of the realities of the incompetency inquiry, the opinion's

[4]The "model provision" on competency procedures set forth in the American Bar Association Standards for Criminal Justice speaks directly to this point. Standard 7-4.8, subdivision (c) provides in this regard: "At the [competency] hearing . . . [¶] (i) The party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence. If the defendant has moved for evaluation then the defense should have the burden of going forward; if the prosecutor or the court on its own motion or on information supplied by the prosecutor has raised the issue, then the prosecutor should have the burden of going forward. [¶] (ii) If the court, after hearing the evidence, finds by the greater weight of the evidence that the defendant is competent to stand trial the matter should proceed to trial; if not, the court should proceed to issues of treatment or habilitation to effect competence." (2 ABA Standards for Criminal Justice, std. 7-4.8 (2d ed. 1986) p. 7.208. See also *id.*, com. to std. 7-4.8, pp. 7.213 to 7.215.)

conclusion cannot be squared with the fact that both the federal courts and the great majority of state courts have long operated under a procedure in which the prosecution bears the burden of proof on the competency issue.

Thus, I conclude that the opinion is in error in upholding the constitutionality of Penal Code section 1369, subdivision (f) insofar as the provision establishes a presumption that a defendant is competent to stand trial and places the burden on the defendant to prove his incompetency. I agree with defendant that the trial court committed constitutional error in instructing the jury pursuant to this provision.

Finally, under the facts of this case, the error cannot properly be found harmless under the applicable standard for federal constitutional error. (See, e.g., *Chapman* v. *California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065].) At the competency hearing in this matter, conflicting testimony was introduced as to defendant's competency to stand trial. Although a number of prosecution experts testified that, in their opinion, defendant was competent to stand trial, the psychiatrist who had the longest relationship with defendant testified that, in his view, defendant was not presently competent to stand trial. In addition, a defense investigator testified as to defendant's repeated refusal to discuss any substantive aspect of the case with him.

Furthermore, in his closing argument to the jury at the competency phase, the prosecutor made a point of emphasizing that the defendant bore the burden of proving his own incompetency. The prosecutor told the jury in this regard: "So the question is, has the defense proven that this defendant is mentally incompetent to stand trial. It's the defense burden. [¶] It's not like the regular criminal case that you have where we have the burden of proving someone guilty beyond a reasonable doubt. We don't have that burden here. [¶] It's the defense burden. The law put that burden on the defendant because otherwise you would have every defendant saying—when it's a tough case against him, every defendant would be coming in and saying, I can't cooperate with my attorney, I can't understand the charges. And you wouldn't have any trials occurring. So the law has made it tough on the defendant to try to prove that."

Under these circumstances, the constitutional error in instructing the jury that defendant bore the burden of proof on the competency issue *cannot be found* harmless beyond a reasonable doubt.

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Accordingly, in light of the prejudicial constitutional error at the competency phase, I conclude that the judgment should be reversed in its entirety. (See, e.g., *People* v. *Marks*, *supra*, 45 Cal.3d 1335; *People* v. *Hale* (1988) 44 Cal.3d 531 [244 Cal.Rptr. 114, 749 P.2d 769].)

Order Due

SUPREME COURT
FILED

FEB 14 1991

Robert Wandruff Clerk

Deputy

ORDER DENYING REHEARING

Crim. 26161 No. S004758

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

TEOFILO MEDINA, JR.,
Appellant

Appellant's petition for rehearing DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

Chief Justice

CC0055

ORIGINAL

90-8370

SUPREME COURT OF THE UNITED STATES

No. ~~89-5474~~

ORIGINAL
Supreme Court, U.S.
FILED
JUL 16 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TEOFILO MEDINA, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for
Writ of Certiorari

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a state criminal prosecution, does the Due Process Clause of the Fourteenth Amendment mandate that the state prove facts beyond those encompassing elements of the crime charged, and assume the burden of proof for demonstrating a defendants competency to stand trial?

2. Does a state's admission of evidence of previously unadjudicated criminal activity involving a capital defendant during the penalty phase violate a defendant's Eighth and Fourteenth Amendment rights?

PARTIES

Petitioner, Teofilo Medina, Jr., is a California state prisoner incarcerated under judgment of death at the California State Prison at San Quentin, California. Respondent is the People of the State of California.

OPINION BELOW

Petitioner, Teofilo Medina, Jr., seeks review of an opinion of the California Supreme Court which affirmed petitioner's judgment of death in an opinion published as People v. Medina, 51 Cal.3d 870, 274 Cal. Rptr. 849, 799 P.2d 1282 (1990). The opinion is set forth in Petitioner's Appendix at pages A3 through A56.

JURISDICTION

The opinion affirming petitioner's judgment of death is a final decision of California'a highest court. This Court has jurisdiction to review the decision of the California Supreme

Court for federal constitutional error through writ of certiorari pursuant to section 1257, subsection (3) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This matter involves the Eighth and Fourteenth Amendments to the United States Constitution, and California Penal Code sections 1369, subdivision (f) and 190.3, subdivision (b). These provisions are set forth in full at pages A1 through A2 of the Appendix.

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STATEMENT OF THE CASE

State Trial Court Proceedings

The murders for which petitioner was convicted and sentenced to death were committed during a crime spree in October and November of 1984, in Orange County, California. On July 9, 1986, the District Attorney of Orange County filed an amended information in Superior Court case number C-56201 charging petitioner with three counts of murder (Cal. Pen. Code § 187), three counts of robbery (Cal. Pen. Code § 211), one count of attempted robbery (Cal. Pen. Code §§ 211/664), two counts of assault with a deadly weapon (Cal. Pen. Code § 245, subd. (a)(2).), one count of false imprisonment (Cal. Pen. Code § 236.1), five counts of burglary (Cal. Pen. Code § 459), one count of grand theft (Cal. Pen. Code § 487.3), and eight counts of ex-felon in possession of a firearm (Cal. Pen. Code § 12021). It was further alleged the murders were committed during the commission of crimes of robbery and burglary (Cal. Pen. Code § 190.2 subds. (a)(17)(i) and (vii), more than one intentional murder was committed (Cal. Pen. Code § 190.2(a)(3), petitioner personally used a firearm during the murders, robberies, attempted robberies, burglaries, and false imprisonment (Cal. Pen. Code § 12022.5) and petitioner had previously been convicted of serious felonies. (Cal. Pen. Code §§ 667, 667.5.) (CT 352-359.)

On October 17, 1986, a jury found petitioner guilty as charged and found the three murders were premeditated and

deliberate first degree murders and the felony murder and multiple-murder special-circumstances and firearm use allegations were found true. (CT 942-967.) On November 20, 1986, the jury found petitioner sane at the time the offenses were committed. (CT 942-967.) A jury verdict imposing the death penalty was rendered on December 3, 1986. (CT 1127-1129.) Petitioner's motion for a new trial and modification of verdict was presented, argued, and denied. (CT 1335.) On December 3, 1986, petitioner was sentenced to death. (CT 1344.)

Proceedings in the Supreme Court of California

Petitioner's direct appeal to the Supreme Court of California was automatic in accordance with Article 6, section 11 of the California Constitution and California Penal Code section 1239, subdivision (b). The decision of the California Supreme Court affirming petitioner's conviction and judgment of death was filed on November 19, 1990. (People v. Medina, 51 Cal.3d 870; Appendix pp. A3 through A57.)

On March 15, 1991, the Superior Court of Orange County filed a warrant of execution ordering petitioner be put to death at San Quentin Prison on June 11, 1991. Thereafter, the California Supreme Court granted petitioner's petition for a stay pending final disposition by this Court on the pending Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

Petitioner's 27-day crime spree included the execution of three convenience store clerks during three separate robberies.[1] The circumstances of are as follows:

Guilt Phase Evidence

On October 13, 1984, petitioner ran out of a pawn shop in Santa Ana, California with a .22-caliber handgun. (RT 4399-4411.) Five days later, he robbed an Arco gas station in Santa Ana and shot the attendant, Horacio Ariza, to death. Ariza had been shot once in the chest and once in the right side of the head at close range. There were no defensive wounds on the victim's body. A car which appeared similar to petitioner's almost struck another car as it sped away from the gas station at approximately 11:30 p.m., just before Ariza was found dead. The robbery netted petitioner somewhere between $137 and $197. (RT 4416-4430, 4446-4448, 4459, 4462-4463, 4466-4468, 4470, 4473, 4490, 4500-4501, 4504.)

Seventeen days later, petitioner robbed a drive-in dairy in the nearby City of Garden Grove at approximately 1:30 p.m. and he shot the clerk, Douglas Metal, to death. Metal was shot in the head behind the left ear, while the gun was against his head.[2] There were no defensive wounds on the victim's body.

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1. The sufficiency of the evidence in support of the judgment of conviction or special circumstance findings are not raised in the instant petition.

2. The neurosurgeon who examined the bodies of the two young men put the two convenience store cases together after examining the small caliber shot to the head on both victims.

The robbery netted petitioner approximately $65. A Perrier bottle at the scene yielded a print matching petitioner. The identification was based on a unique characteristic in part of the print known as the delta. A car similar to petitioner's was seen at the dairy at the time of the murder. (RT 4521-4528, 4532-4544, 4564-4569, 4613-4616, 4621-4623, 4692-4693, 4780, 5022-5024.)

The next day petitioner robbed a Gasco gas station in Santa Ana and shot the attendant, Victor Rea, to death. Rea was found at approximately 11:15 p.m. in the office area with two gun shot wounds to the head just behind the left ear, inflicted while the gun was against his head. There were no defensive wounds on the victim's body. The robbery netted petitioner between $100 and $190. (RT 4789-4796, 4801, 4827-4828, 5040-5042, 5044.)

Two days later, petitioner entered a convenience store in Santa Ana and walked over to the coolers before approaching the register and pointing a gun at the clerk and demanding money. The clerk, who had read about the series of convenience store murders, ran out of the store screaming for help. Petitioner got in his car and the clerk saw the license number of his car and wrote it down. A citizen alerted by the clerk's screams began following petitioner in her car. Petitioner tried to ram her car, and then got out of his car and fired two shots at her. Petitioner drove off and she followed at speeds up to 100 miles an hour until she lost him. She also noted petitioner's license

(RT 4834-4839.)

number. (RT 4840-4847, 4850-4864, 4866, 4879-4885, 4885-4895, 4898-4899, 5008-5016.)

Petitioner, the registered owner of the car, was arrested at his Lake Elsinore home in nearby Riverside County.[3] Petitioner's .22-caliber gun was recovered along with .22-caliber hollow point ammunition inside a shave kit. Two rounds had been expended, and the ammunition inside the gun and the shave kit matched. The projectiles recovered during autopsies of the three victims had been fired from petitioner's gun. (RT 4854, 4900-4918, 4929, 4941-4967, 4970.)

Defense Case

Petitioner initially challenged the fingerprint identification on the Perrier bottle from one of the murder scenes. The defense expert, however, concluded petitioner had made the fingerprint in question. (RT 5448-5454, 5458-5462, 5489-5492, 5502, 5534.) He also produced evidence that the

3. Petitioner was unemployed between August and November of 1984. At the time of his arrest his wallet contained $135 in currency in one part, and $90 in currency in another part. (RT 4924, 5060-5061.)

While petitioner lived in Lake Elsinore, he was staying at the home of his sister in Santa Ana, between November 4, 1984 and November 7, 1984, the dates the drive-in dairy and gas station robbery murders, and the attempted robbery of the convenience store in Santa Ana were committed. He was also away from the home at the times of the crimes. (RT 5047-5053, 5058-5060, 5065-6059, 5107-5109, 5300-5302.) After petitioner returned to his sister's home, following the attempted robbery of the convenience store, he parked his car in back of the house, and looked out the window of the house. He then called another sister, who lived in Lake Elsinore, and asked for a ride. (RT 5139-5144, 5334-5344.) Petitioner's sister told police that he did not want to work in Lake Elsinore, because it was too hot. (RT 5238.)

witness who saw a car similar to petitioner's fleeing the scene of the Arco gas station murder could not positively identify him as the driver. (RT 5575-5579.) Other than asserting an insanity defense, petitioner neither denied his guilt or offered an alibi defense.

Competency Phase

Petitioner made a pretrial motion for a competency hearing pursuant to California Penal Code section 1368 claiming a present inability to cooperate with counsel. At the competency hearing lay witnesses and three psychiatrists and three other experts testified about petitioner's possible paranoid schizophrenia, his violent and aberrant behavior, attempted suicide, and inability to cooperate with counsel. (People v. Medina, supra, 51 Cal.3d 870, 879; Appendix p. 12.) One of the three psychiatrists, who was familiar with petitioner while he was in the Arizona prison system, testified petitioner was a paranoid schizophrenic and incompetent to stand trial. Two other psychiatrists disagreed with the schizophrenia diagnosis, with one leaning toward a finding of competence, and the other opining petitioner was competent to stand trial. Two psychologists also testified; one diagnosed petitioner as schizophrenic, the other doubted the accuracy of a diagnosis of schizophrenia. (Ibid.) Both psychologists opined petitioner was competent to stand trial. The jury found petitioner competent to stand trial.

Sanity Phase

Petitioner testified during the sanity phase, and along with other lay witnesses, recalled his background. He denied any recollection of shooting his victims, but did recall shooting at the woman who chased him from the scene of the attempted robbery. (RT 6121-6127.) Petitioner attempted suicide while in prison in the 1960's and was given anti-psychotic medication. He recalled numerous assaults including once in 1975 when he thought a 75-year old man was reaching for his face so he threw a couple of cups of coffee at him. He moved to Arizona, and used marijuana, hash, and PCP. While living in Arizona, he kidnaped and raped a bar maid and was convicted and sentenced to prison. (RT 6032, 6054, 6060, 6088, 6328.)

While in prison in Arizona, petitioner was sent to a state mental hospital, where he stabbed some people in a kitchen area. After trying to escape from the hospital, he was returned to prison. In prison he was shot by a guard as he tried to climb over a wall in an attempt to attack another inmate. He was also shot at during an escape attempt from prison. He committed other assaults while in prison, including attacking the prison barber. While in prison petitioner received psychotropic medication. (RT 6071, 6073, 6089, 6147, 6173, 6304-6319.)

A psychiatrist, familiar with petitioner through the Arizona prison system, opined that petitioner was a chronic paranoid schizophrenic and was not guilty by reason of insanity. (RT 6350, 6355.) On cross-examination, he conceded he knew

nothing of the facts surrounding petitioner's crimes. (RT 6409-6416.)

A psychologist opined that petitioner has a disorder of schizophrenia of a paranoid type, but the evidence did not show that petitioner was insane at the time of the crimes. (RT 6516-6517, 6520, 6525, 6544, 6558.) A forensic psychiatrist believed petitioner is probably schizophrenic. The evidence, particularly the manner in which the crimes were committed, did show petitioner to be legally sane at the time of the crimes. (RT 6632, 6634, 6704-6716.) He observed that petitioner has a "short fuse", which is not a symptom of schizophrenia. Petitioner had a number of symptoms consistent with a sociopathic type of personality. (RT 6636-6637.) The psychologist also testified that petitioner's lack of recollection of the crimes could not be supported by medical or psychiatric facts. (RT 6651.) He opined the murders were committed either because petitioner did not want to leave witnesses, had a short fuse, or because he is a sociopath who does not care about the lives of others. (RT 6654.)

Another psychiatrist testified that petitioner had no evidence of any kind of mental disturbance which precluded his knowing the nature or quality of his actions and their wrongfulness. He detected evidence of both paranoid schizophrenia and an anti-social personality disorder. He also testified that petitioner was one of the most explosive personalities he had ever met. (RT 6879, 6886-6896, 6904-6906.)

Penalty Phase

The prosecution presented evidence of petitioner robbing and murdering another gas station attendant with the same gun used to kill his three victims in this case, assault on a man in a bar, assault of a prison inmate, and a rape. (RT 7096-7100, 7104-7115, 7120-7124, 7154-7179, 7192-7194.) Additionally, evidence that the murder victim's were passive personalities and unlikely to resist a robbery was introduced. (RT 7219-7329.) Finally, evidence of petitioner's prior convictions for rape, kidnapping, and lewd and lascivious acts committed on July 27, 1977 was introduced. (RT 7329.)

Petitioner relied on mitigating testimony from medical experts on his mental impairment, personality disorder, and low intelligence. Petitioner's father testified about a childhood injury, petitioner's glue sniffing, and unusual behavior. (RT 7228-7229, 7234-7235, 7240-7241, 7258-7260, 7264-7265, 7280-7280.)

Summary of Respondent's Argument

1. A state is only required to prove the elements of a criminal offense. A criminal defendant's competency to stand trial is not an element of the charged offense. Constitutional law affords states great latitude in the proper placement of burdens of proof. Due process concerns arise only when the allocation of that burden subjects defendants to hardship or oppression. The opportunity for knowledge as to the defendant's competency squarely rests with the defendant. While defense counsel can readily attest to the situation with a defendant, the People have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings. Accordingly, California's allocation of the burden of proof and presumption of competency to stand trial does not offend concepts of due process of law.

2. California has a legitimate interest in prosecuting capital cases before a single jury, and in permitting jurors to weigh and consider a defendant's prior criminal conduct in selecting the appropriate penalty, provided that reasonable steps are taken to assure a defendant a fair and impartial penalty. Accordingly, California law permitting introduction of evidence of unadjudicated crimes in the penalty phase of a capital trial does not offend concepts of equal protection and due process and does not deprive a defendant of an inherently reliable death verdict.

ARGUMENT I.

REQUIRING A CRIMINAL DEFENDANT TO PROVE INCOMPETENCY TO STAND TRIAL DOES NOT VIOLATE THE RIGHT OF DUE PROCESS GUARANTEED BY THE FEDERAL CONSTITUTION

Petitioner contends California law violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution by placing the burden of proving incompetency to stand trial on the criminal defendant. (Pet. pp. 7-14.) The California Supreme Court addressed the validity of California's allocation of burden of proof for the first time in petitioner's case. Recognizing the split of authority from other state and federal jurisdictions, the California Supreme Court held the burden of proof upon a criminal defendant embodied in California Penal Code section 1369, subsection (f) passed constitutional muster under both federal and state constitutions. (People v. Medina, supra, 51 Cal. 3d 870, 882-886; Appendix pp. 16, 18.)

California law provides that if "a doubt arises in the mind as to the competence of the defendant" the court shall inquire of defense counsel, and if defense counsel believes his client may be incompetent, the trial court shall order a hearing. (Cal. Pen. Code, § 1368, subd. (a).) Even if defense counsel believes his client to be competent, the trial court has discretion to order a competency hearing. (Cal. Pen. Code § 1368, subd. (b).) Once the trial court has ordered a competency hearing "all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of

the defendant has been determined." (Cal. Pen. Code § 1368 subd. (c).)

Here, petitioner's counsel made a motion for a competency hearing, thereby compelling suspension of criminal proceedings pending a competency hearing. Under California law it is "presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (Cal. Pen. Code § 1369, subsection (f).)

It is well established that the conviction of a criminal defendant while he is legally incompetent violates due process of law. (Pate v. Robinson, 383 U.S. 375, 385, 15 L.Ed.2d 815, 822, 86 S.Ct. 836 (1966).) Moreover, this Court has held that a court's failure to employ procedures to protect against trial of an incompetent defendant violates a defendant's due process right to a fair trial and compels reversal of his conviction. (Id, see Drope v. Missouri, 420 U.S. 162, 171, 43 L.Ed.2d 103, 112-113, 95 S.Ct. 896.) Petitioner contends California's allocation of the burden of proof and presumption of competency violated his federal constitutional right to due process and is contrary to this Court's holdings in Pate and Drope.

Petitioner relies on United States v. DiGilio, 538 F.2d 972, 988 (3rd Cir. 1976) which held it is "contradictory to argue that a defendant who may be incompetent possesses sufficient intelligence that he will be able to adduce evidence of his

incompetency which might otherwise be within his grasp." (Pet. p. 9 citing United States v. DiGilio, supra, 538 F.2d 972, 988, cert. den. 429 U.S. 1038, 50 L.Ed.2d 749, 97 S.Ct. 733; See also, Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982); State v. Jones, 406 N.W. 2d 366, 368-369 (S.D. 1987) [decision based on state constitutional law]; People v. McCallum, 66 Ill.2d 306, 362 N.E.2d 307, 310-311 (1977) [decision based cn state constitutional law].) DiGilio, however, discusses federal procedure, and does not address constitutionality of state statutes which allocate the burden of proof to the defendant.

In Bilyew v. Franzen, supra, the Federal Court of Appeals concurred with a line of Illinois state court decisions which declared a state statute placing the burden of proof of competency on a defendant unconstitutional. The Bilyew court asserted that "There is little question that the Fourteenth Amendment requires the state or federal prosecution to shoulder the burden of proving the defendant is fit to stand trial once the issue of unfitness has been properly raised. [Fn.omitted.] Every court that has considered the issue has so held.[citations omitted]." (Id. at pp. 1244-1245.) The absence of question perceived by the Bilyew court may be attributable to its failure to recognize the contrary authority which exists.

As the California Supreme Court observed, there is "substantial authority" supporting a contrary view. (People v. Medina, supra, 50 Cal. 3d at p. 883; Appendix p. 16.) Indeed, this Court upheld a state statute placing the burden of proof on

a defendant to establish his own insanity, despite the possibility his mental condition might prevent an effective showing. (Leland v. Oregon, 343 U.S. 790, 798-799, 96 L.Ed. 1302, 1308-1309, 72 S.Ct. 1002 (1952; See, Martin v. Ohio, 480 U.S. 228, 236, 94 L.Ed.2d 267, 275-276, 107 S.Ct. 1098 [Ohio statute placing burden of proof on defendant claiming self-defense upheld against due process attack.) In Leland, this Court observed that the state is required to prove only those facts encompassing elements of the crime charged. (Id., at pp. 798-799.) Since Oregon's policy on the allocation of the burden of proof on the issue of sanity did not violate "generally accepted concepts of basic standards of justice" this Court did not interfere with the state's determination of policy. (Id., at p. 799.)

Leland unquestionably remains the law today. (See e.g. Martin v. Ohio, supra, 480 U.S. at p. 236; Patterson v. New York, 432 U.S. 197, 201-205, 53 L.Ed.2d 281, 286-289, 97 S.Ct. 2319 (1977) [following Leland].) Inasmuch as a criminal defendant's competency to stand trial is no more an element of the charged offense, than the question of sanity presented in Leland, California's allocation of the burden of proof necessarily survives a federal due process challenge. (People v. Medina, supra, 51 Cal.3d 870, 884; Appendix p. A17.)

Congress, through legislation, has placed the burden of proof for competency to stand trial with federal prosecutors. (See e.g. 18 U.S.C. 4241.) The federal government's allocation

of the burden of proof in criminal proceedings does not stem from any federal constitutional requirement. As a Fifth Circuit Court of Appeals opinion observed, "We see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant merely because Congress chose to place that burden on the government in federal prosecutions." (Lowenfield v. Phelps, 817 F.2d 285, 294 (5th Cir. 1987), sub opn. 484 U.S. 231, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988).) The Lowenfield court's departure from the Gigilo/Bilyea line of cases stemmed from the Bilyea court's uncritical adoption of the decision of the Illinois courts. (Ibid.) Relying on the better reasoned and more persuasive federal due process analysis in Lowenfield, the California Supreme Court upheld California's allocation of the burden of proof of competency to stand trial on the defendant. (People v. Medina, supra, 51 Cal.3d 870; Appendix at pp. A-17, A-19.)

Petitioner attempts to distinguish Leland on the grounds it addressed an issue of insanity involving a presently competent defendant. (Pet. 12.) Petitioner argues that California Penal Code section 1369, subsection (f) is "irrational" in presuming competency once a doubt about the defendant's competence has arisen. (Pet. p. 12.) He claims it is inconsistent to treat the defendant in the competency proceeding as if he is incompetent while also presuming he is competent. (Pet. p. 13.) Accordingly, petitioner is contending due process compels that the presumption of competence can only

be a presumption affecting the burden of production of evidence, which abates when "doubt" arises to justify further inquiry into the matter. As the California Supreme Court noted, however, due process does not require the presumption of competence to disappear "merely because a preliminary, often undefined and indefinite, `doubt' has arisen that justifies further inquiry into the matter." (People v. Medina, supra, 51 Cal.3d 870, 885; Appendix p. A-19.)

As Lowenfield recognized, the states have great latitude in the proper placement of proof burdens. (Ibid.) Indeed, due process concerns arise only when the allocation of a burden of proof subjects the defendant to hardship or oppression. (Morrison v. California, 291 U.S. 82, 89, 78 L.Ed. 664, 669-679, 54 S.Ct. 281 (1934).)

In accord with Morrison, the "opportunities for knowledge" as to the defendant's competency squarely rests with the defendant. As the California Supreme Court observed:

> "[O]ne might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry. Indeed, this analysis affords a satisfactory answer to Bilyew's (supra, 686 F.2d 1238) concern about the defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability. The People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings." (People v. Medina, supra, 51 Cal.3d 870, 885; Appendix p. 18.)

California's presumption of competence and allocation of the burden of proof to the defendant does not violate federal due process standards.

ARGUMENT II.

ADMISSION OF EVIDENCE OF UNADJUDICATED CRIMES IN THE PENALTY PHASE DID NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OR RENDER HIS DEATH SENTENCE UNRELIABLE

Petitioner contends that the admission of unadjudicated crimes in the penalty phase of his trial violated his federal due process and equal protection rights and offends the Eighth Amendment requirement of heightened reliability in death cases. (Pet. pp. 15-19.) To the contrary, California has a legitimate interest in prosecuting capital cases before a single jury, and in permitting jurors to weigh and consider a defendant's prior criminal conduct in selecting the appropriate penalty, provided that reasonable steps are taken to assure a defendant a fair and impartial penalty.

In the penalty phase, evidence was admitted pursuant to California Penal Code section 190.3, factor (b) of four unadjudicated crimes. Specifically, evidence of petitioner robbing and murdering another gas station attendant, three other separate incidents involving two assaults and a rape was admitted into evidence in the penalty phase.

Petitioner contends his federal constitutional rights were violated since a separate jury did not adjudicate the criminal acts prior to those acts being considered in the penalty phase. The California Supreme Court has repeatedly rejected petitioner's argument. (People v. Medina, supra, 51 Cal.3d 870, 906; Appendix p. A-40.) As the California Supreme Court

observed, this Court has never suggested unadjudicated penalty evidence must be heard by a separate jury. (People v. Balderas, 41 Cal.3d 144, 204-205, 222 Cal.Rptr. 184, 711 P.2d 480 (1985).)

This Court has recognized that states should enjoy broad discretion in deciding which negative aspects of the defendant's character and background are relevant to sentencing considerations. (See, Estelle v. Smith, 451 U.S. 454, 472-473, 68 L.Ed.2d. 359, 101 S.Ct. 1866 (1981); Jurek v. Texas, 428 U.S. 262, 276, 49 L.Ed.2d. 929, 96 S.Ct. 2950 (1976).) Indeed, this Court has approved capital punishment statutes which contemplated the consideration of other crimes evidence in connection with penalty. (Gregg v. Georgia, 428 U.S. 153, 165-166, fn. 9, 49 L.Ed.2d. 859, 96 S.Ct. 2909 (1976); Proffit v. Florida, 428 U.S. 242, 248-249, fn. 6, 49 L.Ed.2d. 913, 96 S.Ct. 2960 (1976).)

California law affords basic procedural protections to capital defendants in the use of unadjudicated crimes in the penalty phase determination. First, evidence of unadjudicated crimes is limited to crimes involving the use or threat to use violence. (People v. Gates, 43 Cal.3d 1168, 1202, 240 Cal.Rptr. 666, 743 P.2d. 301 (1987).) Additionally, the reliability requirement of the Eighth Amendment is satisfied by the California rule of law that uncharged violent acts must be proved beyond a reasonable doubt. (People v. Robertson, 33 Cal.3d 21, 53-55, 188 Cal.Rptr. 77, 655 P.2d. 279 (1982).) Accordingly, petitioner has not been denied his federal constitutional rights

based on admission of unadjudicated violent acts in the penalty phase.

California law does not decrease the reliability of the determination that death is appropriate. To the contrary, admission of uncharged violent criminal activity adds to the reliability of the determination by ensuring receipt of a complete and accurate picture of petitioner's character and background. The use of unadjudicated acts within the strict limitations imposed by California courts does not violate petitioner's constitutional rights.

CONCLUSION

Petitioner's challenge to placing the burden of proof of competency to stand trial on the defendant is unpersuasive. California's legitimate policy interest in allocating the burden of proof to the party with access to the relevant information does not offend concepts of due process.

Petitioner's challenge to the admission of evidence of unadjudicated criminal conduct in the penalty phase of a capital trial is devoid of merit. California has a legitimate interest in litigating a capital case before a single jury, and in permitting consideration of a capital defendant's prior criminal conduct in selecting the appropriate penalty. California's law protects that legitimate interest, without offending concepts of due process and equal protection, while affording a reliable death verdict, as reasonable steps are taken to assure defendants a fair and impartial penalty trial.

Given the substantively weak issues presented by petitioner, respondent respectfully requests the instant Petition for Writ of Certiorari be denied.

Dated: July 15, 1991.

Respectfully submitted,

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No: 90-8370
October Term, 1990

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TEOFILO MEDINA, JR.,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine (9) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 16th day of July, 1991.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 16, 1991.

Regina C. Kamholz
REGINA C. KAMHOLZ

Subscribed and sworn to before me
this 16th day of July, 1991.

Anne Marie Bryant
Notary Public in and for said County and State

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No. 90-8370

In The

Supreme Court of the United States

October Term, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of California

JOINT APPENDIX

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Petition For Certiorari Filed June 14, 1991
Certiorari Granted October 21, 1991

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CHRONOLOGICAL LIST OF RELEVANT DATES

March 14, 1985 –	Information filed in Superior Court of California, Orange County.
May 12, 1986 –	Declaration filed by defense counsel requesting entry of plea of not guilty by reason of insanity on defendant's behalf.
May 13, 1986 –	Motion filed by defense counsel for hearing on defendant's competency under California Penal Code section 1368.
July 6, 1986 –	Third amended information filed.
July 7, 1986 –	Order entered declaring doubt as to defendant's competence to stand trial, suspending criminal proceedings, and instituting proceedings under California Penal Code section 1368.
July 14, 1986 –	Jury trial on issue of competence commenced.
July 22, 1986 –	Court instructs jury.
July 22, 1986 –	Verdict returned finding defendant competent to stand trial.
July 24, 1986 –	Defendant enters plea of not guilty and not guilty by reason of insanity to third amended information.
September 20, 1986 –	Jury trial of guilt phase commenced.
October 17, 1986 –	Jury verdict returned finding defendant guilty of all offenses

charged in third amended information.

November 3, 1986 – Order entered granting motion to withdraw plea of not guilty by reason of insanity.

November 5, 1986 – Order entered granting defendant's personal motion to reinstate plea of not guilty by reason of insanity.

November 5, 1986 – Jury trial on issue of sanity commenced.

November 20, 1986 – Jury verdicts returned finding defendant sane at the time of offenses.

December 4, 1986 – Jury returns verdicts imposing death penalty.

February 25, 1987 – order entered denying motion for modification of judgment and imposing death penalty.

February 26, 1987 – Commitment and judgment of death filed.

November 19, 1990 – Decision of Supreme Court of California filed, affirming conviction and sentence on automatic appeal, two justices dissenting.

February 14, 1991 – Order of Supreme Court of California filed, denying petition for rehearing, two justices dissenting.

May 6, 1991 – Order filed by Justice O'Connor, extending time for filing petition for certiorari.

TRANSCRIPT OF PROCEEDINGS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, vs. TEOFILO MEDINA, JR., DEFENDANT.	No. C-56201

DEPARTMENT 45
HON. JAMES K. TURNER, JUDGE PRESIDING

[RT 48] SANTA ANA, CALIFORNIA, WEDNESDAY, JULY 9TH, 1986

AFTERNOON SESSION

* * *

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE PROSPECTIVE JURORS:)

(WHEREUPON THE PROSPECTIVE JURORS WERE DULY SWORN.)

* * *

[RT 49] THE COURT: LADIES AND GENTLEMEN, THIS IS THE CASE OF THE PEOPLE OF THE STATE OF CALIFORNIA VERSUS TEOFILO MEDINA, JR. AND I

WOULD LIKE TO GIVE YOU AN INSTRUCTION RIGHT AT THE OUTSET IN THIS CASE.

THOSE OF YOU WHO ARE SELECTED TO SIT ON THE JURY WILL RECEIVE THIS INSTRUCTION AGAIN AT THE END OF THE TRIAL BUT THIS IS TO LET YOU KNOW WHAT THE CASE IS ABOUT.

> "IN THIS PROCEEDING, YOU ARE TO DECIDE WHETHER OR NOT THE DEFENDANT IS MENTALLY COMPETENT TO BE TRIED FOR A CRIMINAL OFFENSE. THIS PROCEEDING IS NOT IN ANY SENSE A CRIMINAL PROCEEDING. ANY INNOCENCE OR GUILT OF THE DEFENDANT OF THE CRIMINAL CHARGE AGAINST HIM IS NOT INVOLVED.
>
> "ALTHOUGH ON SOME SUBJECTS HIS MIND MAY BE DERANGED OR UNSOUND, A PERSON CHARGED WITH A CRIMINAL OFFENSE IS DEEMED MENTALLY COMPETENT TO BE TRIED FOR THE

[RT 50] CRIME CHARGED AGAINST HIM.

> "ONE, IF HE IS CAPABLE OF UNDERSTANDING THE NATURE AND PURPOSE OF THE PROCEEDINGS AGAINST HIM;
>
> "AND, TWO, IF HE COMPREHENDS HIS OWN STATUS AND CONDITION IN REFERENCE TO SUCH PROCEEDING;
>
> "AND, THREE, IF HE IS ABLE TO ASSIST HIS ATTORNEY IN CONDUCTING HIS DEFENSE IN A RATIONAL MANNER.
>
> "THE DEFENDANT IS PRESUMED TO BE MENTALLY COMPETENT AND HE HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS MENTALLY INCOMPETENT AS A RESULT OF MENTAL DISORDER OR DEVELOPMENTAL DISABILITY.
>
> "PREPONDERANCE OF THE EVIDENCE MEANS SUCH EVIDENCE AS, WHEN WEIGHED WITH THAT OPPOSED TO IT, HAS MORE CONVINCING FORCE AND THE GREATER PROBABILITY OF TRUTH."

SO JUST TO PUT IT IN A CAPSULE, WE'RE NOT INTERESTED AND YOU ARE NOT INTERESTED IN THE INNOCENCE OR GUILT OF THE DEFENDANT BUT WHETHER HE IS MENTALLY COMPETENT TO STAND TRIAL AS I HAVE JUST DEFINED THAT TO YOU.

* * *

[RT 109] MR. BROWN: OKAY. IN THIS CASE, WE'RE TALKING ABOUT THE COMPETENCY TO STAND TRIAL. AND AS MR. KREBER POINTED OUT, [RT 110] THE DEFENSE HAS THE BURDEN IN THAT. SO THE DEFENDANT HAS TO CONVINCE YOU, BY A PREPONDERANCE OF THE EVIDENCE, AND THE JUDGE WILL INSTRUCT YOU AS TO WHAT THAT MEANS, THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL.

IF THE DEFENDANT DOESN'T MEET THAT BURDEN, IF THEY DON'T CONVINCE YOU TO A PREPONDERANCE, THEN YOU HAVE AN OBLIGATION AS A JUROR TO FIND THE DEFENDANT COMPETENT TO STAND TRIAL. OKAY.

IT'S A DIFFERENT BURDEN THAN THE NORMAL CRIMINAL LAW BURDEN. IN CRIMINAL LAW – LET'S SAY IF YOU GUYS FIND MR. MEDINA COMPETENT TO STAND TRIAL AND WE HAVE ANOTHER JURY DECIDE HIS GUILT, THAT JURY HAS TO DECIDE BEYOND A REASONABLE DOUBT GUILT, AND I HAVE THE BURDEN BEYOND A REASONABLE DOUBT TO PROVE THE DEFENDANT'S GUILT.

BUT IN THIS COMPETENCY THING, IT'S COMPLETELY THE OTHER WAY AROUND. THE DEFENDANT HAS THE BURDEN, TO PROVE TO A PREPONDERANCE OF THE EVIDENCE, THAT THE DEFENDANT IS INCOMPETENT.

DOES EVERYBODY UNDERSTAND THAT?

* * *

[RT 216] SANTA ANA, CALIFORNIA – MONDAY, JULY 14, 1986

MORNING SESSION

* * *

GEORGE SAKURAI, M.D., CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: MY NAME IS GEORGE SAKURAI, S-A-K-U-R-A-I.

[RT 217] DIRECT EXAMINATION

BY MR. KREBER: Q. WHAT IS YOUR OFFICIAL TITLE?

A. I AM THE PSYCHIATRIC DIRECTOR OF THE JAIL PSYCHIATRIC TEAM.

* * *

[RT 241] Q. HOW MANY YEARS' EXPERIENCE HAVE YOU HAD DEALING WITH CRIMINAL INMATES?

A. WELL, DIRECTLY WITH THE FEDERAL BUREAU OF PRISONS, THREE YEARS, AND THEN ADMINISTRATIVELY FOR PROBABLY 10 YEARS.

Q. AND THEN SPECIFICALLY IN THE LAST TWO AND A HALF YEARS YOU HAVE DEALT WITH CRIMINAL INMATES EXCLUSIVELY AT THE ORANGE COUNTY JAIL; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND HAVE YOU NOTICED A TENDENCY FOR A CRIMINALLY ACCUSED INDIVIDUAL THAT IS CHARGED WITH A SERIOUS CRIME OR SERIOUS CRIMES TO MALINGER A MENTAL ILLNESS IN ORDER TO AVOID GOING TO TRIAL?

A. I HAVE SEEN IT OCCASIONALLY, YES.

Q. YOU SEE THAT ONCE IN A WHILE; IS THAT RIGHT?

A. YES.

Q. AND WOULD YOU SEE A DIFFERENCE WHEN YOU SEE THAT BETWEEN A PERSON THAT IS

CHARGED WITH MINOR PETTY THEFT OR SOMETHING AND SOMEONE THAT IS CHARGED WITH THREE OR FOUR COUNTS OF INTENTIONAL EXECUTION-TYPE MURDERS?

A. IF YOU ARE ASKING FOR A DIFFERENTIATION THERE, [RT 242] NO, I DON'T SEE ANY DIFFERENTIATION.

Q. YOU MEAN THE INDIVIDUAL THAT IS CHARGED WITH A PETTY THEFT IS JUST AS LIKELY TO FEIGN MENTAL ILLNESS TO AVOID TRIAL AS IS ONE THAT IS CHARGED WITH THREE OR FOUR COUNTS OF MURDER?

A. I THINK THAT IT CAN HAPPEN IN EITHER SITUATION.

Q. WHICH ONE WOULD YOU MORE LIKELY SEE FEIGNING?

A. I DON'T THINK THERE WOULD BE A SIGNIFICANT DIFFERENCE.

* * *

[RT 244] BY MR. BROWN: Q. BASED UPON THE NUMBER OF TIMES THAT YOU HAVE SEEN MR. MEDINA AND TALKED WITH HIM THOSE EIGHT TO 10 TIMES,DO [sic] YOU HAVE AN OPINION AS TO WHETHER OR NOT HE UNDERSTANDS THE NATURE OF THE CHARGES HERE, I.E., THAT HE IS CHARGED WITH THREE COUNTS OF MURDER AND A NUMBER OF OTHER MISCELLANEOUS CRIMES?

A. I DO NOT HAVE AN OPINION.

Q. SO YOU CANNOT EXTRAPOLATE FROM YOUR OTHER CONVERSATIONS WITH THE DEFENDANT WHETHER OR NOT HE UNDERSTANDS THE NATURE OF THE CHARGES HERE; IS THAT CORRECT?

A. I THINK HE UNDERSTANDS A LOT OF THINGS I TALKED WITH HIM ABOUT, AND I HAVE CONFIDENCE IN HIS ABILITY TO UNDERSTAND WHAT I'M TALKING TO HIM ABOUT.

BUT I DON'T KNOW – I REALLY CANNOT MAKE AN EXTRAPOLATION IN TERMS OF WHETHER HE UNDERSTANDS THINGS THAT ARE OF A LEGAL MATTER.

* * *

[RT 257] Q. ON JULY 7TH YOU CLEARED THE DEFENDANT TO COME BACK TO COURT; ISN'T THAT CORRECT?

A. YES.

Q. SO IN YOUR OPINION AT THAT TIME THE DEFENDANT IS ABLE TO COME BACK TO COURT; IS THAT CORRECT?

A. YES.

Q. HE IS ABLE TO STAND TRIAL, ISN'T HE?

A. YES.

Q. IS ABOUT THE MOST SERIOUS THING THAT IS GOING ON [RT 258] WITH THE DEFENDANT RIGHT NOW AS FAR AS MENTALLY IS DEPRESSION; IS THAT CORRECT?

A. WELL, ALL RIGHT. YES.

Q. WOULDN'T ANY OF US BE DEPRESSED IF WE WERE CHARGED WITH MURDERING VICTOR REA ON NOVEMBER 5TH, DOUGLAS METAL ON NOVEMBER 4TH, GREG MARTIN ON OCTOBER 19TH AND HORACIO ARIZA ON OCTOBER 18TH, 1984 AND A NUMBER OF OTHER CRIMES, WOULDN'T THAT BE – THAT WOULD DEPRESS US, WOULDN'T IT?

A. PROBABLY.

Q. IT WOULD DEPRESS YOU, WOULDN'T IT?

A. YES.

Q. CERTAINLY DEPRESS ME. THERE IS NOTHING UNUSUAL ABOUT THIS GUY OVER HERE, IS THERE, CONSIDERING THE CIRCUMSTANCES THAT HE IS IN RIGHT NOW?

A. YES.

* * *

[RT 269] SYLVIA AYALA, CALLED AS A WITNESS, BY THE DEFENSE OUT OF ORDER, WAS SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WILL YOU STATE YOUR NAME AND SPELL YOUR LAST FOR THE COURT, PLEASE.

THE WITNESS: SYLVIA AYALA, A-Y-A-L-A.

* * *

[RT 270] THE CLERK: THANK YOU.

DIRECT EXAMINATION

BY MR. KREBER: Q. WHAT RELATIONSHIP ARE YOU TO MR. MEDINA, THE DEFENDANT IN THIS CASE?

A. I'M HIS SISTER.

* * *

Q. AND IN AUGUST '84, HOW LONG DID HE LIVE WITH YOU?

A. THREE MONTHS.

Q. UP UNTIL HE WAS ARRESTED?

A. YES.

Q. NOW, AT THE TIME THAT HE CAME TO LIVE WITH YOU, DID YOU NOTE ANY OBSERVATION REGARDING HIS BEHAVIOR?

A. YES.

Q. AND WHAT WAS IT?

[RT 271] A. HE HAD CHANGED IN MANY WAYS. HE WAS NOT HIMSELF.

Q. BUT YOU HAVE TO DESCRIBE IN CERTAINTY, WHAT DID YOU OBSERVE HIM DO TO DRAW THIS CONCLUSION?

A. WELL, AT FIRST HE WOULD LOOK AT TV, HAVE A RADIO ON AT THE SAME TIME AND THE TV WITH NO VOICE. AND THEN HE WOULD MUMBLE A LOT AND TALK TO HIMSELF. AND THEN HE WOULD TALK ABOUT PEOPLE, SPIES AND STUFF LIKE THAT,

YOU KNOW, JUST THINGS THAT DIDN'T MAKE SENSE.

Q. NOW, HOW LONG A TIME WOULD YOU SEE HIM WATCH TV WITHOUT ANY SOUND?

A. OH, HALF HOUR TO AN HOUR. IT DEPENDS. HE WAS RESTLESS. AND HE WOULD GO FROM HIS ROOM TO ANOTHER ROOM AND BACK AND FORTH.

Q. AND WAS THIS DURING THE ENTIRE THREE MONTHS THAT HE WAS WITH YOU?

A. YES.

Q. OKAY. ANYTHING ELSE THAT YOU OBSERVED ABOUT THE WAY HE BEHAVED?

A. WELL, I'D TALK TO HIM SOMETIMES, AND HE WOULD IGNORE ME, HE WOULDN'T ANSWER ME. AND SOMETIMES I'D ASK HIM A QUESTION AND HE WOULD JUST WALK OFF, LIKE IF HE DIDN'T HEAR ME.

* * *

[RT 279] Q. [BY MR. BROWN]: HE'S REALLY MORE MEAN THAN ANYTHING ELSE, DON'T YOU THINK?

A. NO. I WOULD SAY HE'S A LITTLE MENTALLY ILL.

Q. A LITTLE BIT MENTALLY ILL?

A. YES.

Q. YOU DIDN'T HAVE ANY TROUBLE TALKING WITH HIM? IF YOU ASKED HIM A QUESTION AND THEN HE WANTED TO ANSWER HE WOULD ANSWER YOU, WOULDN'T HE?

A. SOMETIMES.

* * *

[RT 280] Q. WAS THERE A TIME PERIOD WHEN THE DEFENDANT WOULD TELL YOU TO TRY TO DECEIVE HIS PAROLE OFFICER?

A. ONLY WHEN IT CONCERNED HIM ABOUT LOOKING FOR A JOB.

* * *

[RT 281] Q. OKAY. AND THAT WOULD BE THE REASON THAT YOU DIDN'T USUALLY WANT TO CONFRONT HIM; IS THAT CORRECT? BECAUSE YOU DIDN'T LIKE TO BE YELLED AT?

A. NO, BECAUSE HE WAS DIFFERENT ALSO.

Q. EXCUSE ME?

A. HE WAS DIFFERENT. HE WAS – HE WAS, LIKE TWO [RT 282] PERSONS IN ONE.

Q. YOU MEAN LIKE HE WAS MEAN, HE COULD GET MEAN ALL OF A SUDDEN?

A. YES. AND THEN – LIKE HE WOULD FORGET THINGS.

Q. HE WOULD TELL YOU HE FORGOT THINGS?

A. NO. I NOTICED. I WOULD ASK HIM A QUESTION AND THEN ASK HIM AGAIN AT ANOTHER TIME, AND HE WOULD FORGET WHAT HE TOLD ME.

Q. DID HE – WAS IT SOMETHING THAT YOU WANTED HIM TO DO?

A. NO, IT WAS SOMETHING –

Q. WHAT WAS IT?

A. – RELATED TO ABOUT WORKING ON A CAR OR SOMETHING LIKE THAT. HE'D SAY ONE THING AND THEN ANOTHER DAY HE'D COME OUT WITH ANOTHER THING.

* * *

[RT 288] IRENE MC INTOSH, CALLED AS A WITNESS BY THE DEFENSE, WAS SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WILL YOU STATE YOUR NAME AND SPELL YOUR LAST FOR THE COURT, PLEASE.

THE WITNESS: IRENE MC INTOSH, M-C-I-N-T-O-S-H.

THE CLERK: THANK YOU.

DIRECT EXAMINATION

* * *

[RT 294] Q. NOW, WHEN YOU'RE HAVING THIS CONVERSATION WITH YOUR BROTHER, YOU DON'T HAVE ANY TROUBLE COMMUNICATING WITH HIM, DO YOU?

A. NO, SIR.

* * *

[RT 297] Q. SO YOU TRUSTED THE DEFENDANT ENOUGH TO TAKE YOUR YOUNG SON TO AND FROM SCHOOL; ISN'T THAT CORRECT?

A. (NO AUDIBLE RESPONSE.)

Q. SO HE WASN'T SO BIZARRE –

THE COURT: EXCUSE ME, MR. BROWN. WAS YOUR ANSWER YES?

THE WITNESS: YES.

BY MR. BROWN: Q. HE WASN'T SO BIZARRE OR SO DIFFERENT THAT YOU WORRIED ABOUT THE DEFENDANT HURTING YOUR SON OR ANYTHING LIKE THAT, WERE YOU?

A. NO. I – I WASN'T SCARED OF MY BROTHER. NONE OF US WERE.

* * *

[RT 311] Q. AND YOU'VE TALKED TO HIM ABOUT THE CHARGES AGAINST HIM, HAVEN'T YOU?

A. NOT VERY MUCH. IT'S HARD TO TALK ABOUT.

Q. IS IT HARD FOR YOU TO TALK ABOUT IT, BECAUSE YOU'RE DISAPPOINTED IN WHAT HE'S DONE? OR IS IT HARD FOR HIM TO TALK ABOUT?

A. HE DOESN'T TALK ABOUT IT. HE DOESN'T KNOW NOTHING. HE – HE SAID HE DOESN'T REMEMBER NOTHING. I DON'T KNOW WHAT TO THINK ABOUT IT.

Q. IS THAT WHAT HE TOLD YOU? THAT HE DOESN'T REMEMBER ANYTHING?

[RT 312] A. HE SAID THEY'RE ACCUSING HIM OF THINGS. HE SAID THEY'RE UNCIVILIZED.

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[RT 319] SANTA ANA, CALIFORNIA – TUESDAY, JULY 15, 1986

MORNING SESSION

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DAVID ECHEANDIA, CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: MY NAME IS DAVID ECHEANDIA, E-C-H-E-A-N-D-I-A

DIRECT EXAMINATION

BY MR. KREBER: Q. WHERE ARE YOU EMPLOYED?

[RT 320] A. THE ORANGE COUNTY JAIL, MENTAL HEALTH.

Q. AND WHAT IS YOUR TITLE THERE?

A. I AM CLINICAL DIRECTOR AND CLINICAL PSYCHOLOGIST.

* * *

[RT 330] Q. AND THIS IS A PROBLEM THAT WE'RE GETTING INTO, DOCTOR, AS TO WHETHER – I TAKE IT YOU DO NOT WANT TO GIVE AN OPINION AS TO

MR. MEDINA'S COMPETENCY BECAUSE YOU HAVE NEVER REALLY BEEN ORDERED TO DO SO BY THE COURT OR ANYBODY ELSE?

A. I HAVE NEVER BEEN ORDERED AND I DO NOT DO THAT EVALUATION. I REALLY WOULDN'T BE AN EXPERT AT IT.

* * *

[RT 339] Q. AND I TAKE IT FROM YOUR ASSESSMENT OF THE FIVE AND SIX TIMES THAT YOU HAVE SEEN MR. MEDINA, WOULD YOU AGREE OR DISAGREE WITH THAT ASSESSMENT?

A. THAT MR. MEDINA HAS A PSYCHOSIS? I WOULD NOT SAY THAT I WOULD DESCRIBE HIS CONDITION AS BEING PRIMARILY PSYCHOTIC. I WOULD SAY THERE ARE PERIODS WHERE HE SEEMS TO BEHAVE IN WAYS THAT SUGGEST SOME TEMPORARY IMPAIRMENT OF REALITY TESTING, THAT IS, THAT HE MAY AT TIMES APPEAR TO BE DOING SOMETHING THAT IS SUGGESTIVE OF A LOSS OF CONTACT WITH REALITY BUT FOR VERY BRIEF PERIODS OF TIME.

Q. WELL, IN YOUR EVALUATION OF MR. MEDINA MADE FOR DIFFERENT PURPOSES, HOW DID YOU FIND HIS MEMORY TO WORK WHEN YOU VISITED HIM?

A. ON SEVERAL OCCASIONS THAT I SPOKE TO HIM, HE REPORTED THAT HE DID NOT REMEMBER EVENTS THAT HAD OCCURRED QUITE RECENTLY. SO AT LEAST ON THE BASIS OF WHAT HE TOLD ME, HE WAS REPORTING A MEMORY PROBLEM.

* * *

[RT 340] Q. NO, LET'S ISOLATE IT.

DID YOU FIND MR. MEDINA TO TRY TO MANIPULATE YOU NOT TO COME TO COURT?

A. I DON'T RECALL HIM EVER SAYING ANYTHING DIRECTLY TO ME ABOUT COMING TO COURT ONE WAY OR THE OTHER. I DON'T THINK HE EVER DIRECTLY MANIPULATED ME.

* * *

[RT 342] Q. IN THE MIDDLE OF THE PAGE, WHAT WAS YOUR ASSESSMENT OF MR. MEDINA; WOULD YOU READ THAT?

A. SAYS "MY CONCLUSION FROM REVIEWING AVAILABLE PSYCHIATRIC HISTORY IS THAT THE PATIENT IS UNPREDICTABLE, POTENTIALLY VIOLENT AT ANY GIVEN TIME AS HIS HISTORY HERE INDICATES AND SUFFERS FROM EITHER A PARANOID SCHIZOPHRENIC DISORDER OR SEVERE BORDERLINE PERSONALITY DISORDER. THE SIGNS AND SYMPTOMS APPEAR INCONGRUENT WITH THE SIMPLE DIAGNOSIS OF ANTISOCIAL PERSONALITY."

Q. AND YOU BELIEVE THIS ASSESSMENT TO BE TRUE THAT YOU MADE ON JUNE 13TH OF THIS YEAR?

A. I WOULD NO LONGER DIAGNOSE HIM AS A PARANOID SCHIZOPHRENIC.

Q. WHAT HAS CHANGED YOUR MIND FROM JUNE 13TH TO THE TIME THAT YOU FORMED THIS NEW OPINION.

A. WELL, IT WAS DIFFICULT TO DIAGNOSE MR. MEDINA [RT 343] BECAUSE SPEAKING TO HIM AT VARIOUS TIMES HE WAS UNCOMMUNICATIVE OR WAS DIFFICULT TO KNOW WHAT WAS GOING ON IN HIS MIND. I WOULD OFTEN HAVE TO RELY ON HIS BEHAVIOR AND THAT IN AND OF ITSELF IS NOT THE BEST WAY TO DIAGNOSE.

AT THE TIME I WROTE THIS NOTE, I WAS REFERRING TO INFORMATION OBTAINED FROM THE PSYCHIATRIC RECORDS COMING FROM OTHER INSTITUTIONS THAT REFLECTED PARANOID SCHIZOPHRENIA AS ONE POSSIBLE DIAGNOSIS ALONG WITH ANTISOCIAL AS ANOTHER ONE. AND GIVEN THAT THIS INFORMATION WAS COMING IN TO US, TO ADD TO WHAT OUR EXPERIENCE OF HIM WAS, IN EFFECT I WAS REFLECTING A RANGE OF POSSIBILITIES WHEN I MADE THAT STATEMENT.

SINCE THEN I HAVEN'T SEEN THE KIND OF CHRONIC PSYCHOTIC PROCESS THAT IS THE CONSTANT BEING OUT OF TOUCH WITH REALITY AND VARIOUS OTHER SYMPTOMS THAT WOULD INDICATE TO ME A FULL-BLOWN PARANOID SCHIZOPHRENIC.

Q. WHEN DEALING WITH MR. MEDINA, DID YOU FIND HIM TO BE IN TOUCH WITH REALITY A LOT OF THE TIMES?

A. WELL, IT VARIED. IT WAS DIFFICULT TO ASSESS MOST OF THE TIME.

Q. DID YOU FIND -

A. ON SEVERAL OCCASIONS HE WAS QUITE AGITATED, APPEARED DISORIENTED OR CONFUSED. REPORTED THAT HE DID NOT REMEMBER WHAT HAD HAPPENED. IT WAS DIFFICULT TO SAY WHETHER HE WAS INTENTIONALLY DEVELOPING THOSE SYMPTOMS OR WHETHER HE WAS REALLY EXPERIENCING THEM THAT WAY.

* * *

[RT 404] SANTA ANA, CALIFORNIA - WEDNESDAY, JULY 16, 1986

MORNING SESSION

WILLARD S. GOLD, M.D., CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: WILLARD S. GOLD. G-O-L-D., M.D.

DIRECT EXAMINATION

BY MR. STONE: Q. GOOD MORNING, DR. GOLD.

A. GOOD MORNING.

Q. WOULD YOU PLEASE TELL US YOUR CURRENT OCCUPATION AND EMPLOYMENT STATUS?

A. I AM A PSYCHIATRIST, SELF-EMPLOYED, AND ALSO A CONSULTANT TO THE HEART OF TEXAS MENTAL HEALTH AND MENTAL RETARDATION FACILITY IN WACO.

* * *

A. GIVE YOU AN EXAMPLE OF AN INDIVIDUAL THAT, SAY, HAS SOME REAL IMPORTANT THINGS HAPPENING IN HIS LIFE. HOWEVER, WHEN YOU TALK TO THIS INDIVIDUAL OR ATTEMPT TO TALK TO THIS INDIVIDUAL ABOUT THIS IMPORTANT THING, HE IS OR SHE IS

[RT 410] PREOCCUPIED WITH SOMETHING THAT IS NOT REALLY RELEVANT TO THE IMPORTANT THING; IT IS SOMETHING MINOR THAT WOULD IN THIS SCHEME OF THINGS CERTAINLY BE AT THE END OF THE DISCUSSION.

FOR INSTANCE, BE SOMEONE THAT IS - HAS A - HAS AN EXAM, SAY A FINAL EXAM FOR COLLEGE, AND THIS PERSON HAS A TUTOR, FOR INSTANCE, THAT IS GOING TO PREPARE THEM FOR THIS FINAL EXAM, AND ALL THE PERSON WHO'S GOING TO TAKE THIS FINAL EXAM CAN TALK TO THE TUTOR ABOUT IS A HAIRBRUSH, HAS TO FIND A HAIRBRUSH, DOESN'T HAVE A HAIRBRUSH.

WE HAVE FIVE DAYS TO PREPARE FOR THIS EXAM. AND FOR THE WHOLE FIVE DAYS THIS PERSON IS PREOCCUPIED WITH GETTING A HAIRBRUSH THAT HE DOESN'T HAVE.

IS THAT CONSISTENT WITH A PARANOID SCHIZOPHRENIC?

A. YES.

Q. CAN YOU EXPLAIN WHY THAT IS CONSISTENT?

A. THAT COULD BE A MANIFESTATION OF WHAT IS CALLED PSYCHOTIC DENIAL. THERE IS NO TEST, THERE IS NOT STRESS, THERE IS NO PRESSURE; ALL THAT IS REAL IS WHAT I CHOOSE TO THINK ABOUT. AND IF I FOCUS ON A HAIRBRUSH, THEN THAT IS THE ONLY PROBLEM THAT EXISTS. THAT IS CALLED PSYCHOTIC DENIAL. YOU WILL SEE IT AGAIN AND AGAIN WITH THIS TYPE OF DISORDER.

* * *

[RT 411] Q. IN YOUR OPINION IS THIS CONSISTENT WITH A MALINGERER?

A. NO.

Q. WHY IS THAT? FIRST FOR THE JURY AND MYSELF, WOULD YOU GIVE US A DEFINITION OF "MALINGERING"?

A. A PERSON WHO IS NOT ILL BUT PRETENDS TO BE SO, IN THIS CASE MENTALLY ILL.

Q. HAVE YOU EVER EXAMINED A PRISONER THAT YOU DETERMINED TO BE A MALINGERER?

A. HUNDREDS.

Q. WOULD YOU SAY THE PRISONERS YOU HAVE EXAMINED, THE MAJORITY WERE MALINGERERS VERSUS PARANOID SCHIZOPHRENICS?

A. NO, THE MAJORITY WERE SOCIOPATHS OR ANTISOCIAL PERSONALITY DISORDERS.

Q. SECOND WOULD BE – BETWEEN THE TWO, PARANOID SCHIZOPHRENIC AND THE MALINGERER, I GUESS THERE IS NO COMPARISON THERE?

A. PARANOID SCHIZOPHRENIC IS SOMEONE WHO'S SEVERELY ILL AND IS NOT MALINGERING.

Q. BUT IT IS QUITE COMMON TO FIND MALINGERERS, ESPECIALLY IN THE FIELD OF THE PRISON SYSTEM?

A. YES.

* * * *

[RT 412] Q. ON THE PSYCHOTIC DENIAL, THAT IS NOT FOUND WITH A MALINGERER?

A. NO.

Q. THIS PREOCCUPATION IS NOT FOUND WITH A [RT 413] MALINGERER, BEING THAT THEY ARE CONNECTED?

A. NOT TO THAT DEGREE.

Q. AND WHY IS THAT?

A. THE MALINGERER IS VERY GOAL ORIENTED. HE WANTS TO PERSUADE YOU WITH THE LEST [sic] AMOUNT OF EFFORT AND FRILLS ON HIS PART THAT HE IS ILL AND HE DOESN'T CARE TO GO INTO A LOT OF SONG AND DANCE AND A LOT OF EXTRA PRESENTATIONS IN WHICH HE MIGHT BE CAUGHT AND DISCOVERED AS FAKING.

SO HE TENDS – HE OR SHE TENDS TO KEEP IT AS SIMPLE A PRESENTATION AS THEY CAN.

* * *

Q. THIS PSYCHOTIC DENIAL, WHAT BRINGS THIS ON; WHAT WOULD TRIGGER THIS IN A PARANOID SCHIZOPHRENIC?

A. SCHIZOPHRENICS HAVE A VERY ACTIVE FANTASY LIFE AND AT TIMES WHEN THEY ARE PSYCHOTIC, IT IS DIFFICULT TO DIFFERENTIATE BETWEEN WHAT IS FANTASY AND WHAT IS REAL. AND THEREFORE THEY ARE CONTINUALLY GOING BACK AND FORTH ACROSS THAT LINE. SO THIS IS JUST PART OF THE JUNGLE THAT THEY LIVE IN. IT IS THEIR DAY-TO-DAY LIFE.

* * *

[RT 428] Q. IT CAN OCCUR. IF YOU HAVE SOMEBODY THAT IS IN '78, '79 DIAGNOSED AS A PARANOID SCHIZOPHRENIC AND HE IS IN JAIL FOR THE MAJORITY OF THE TIME EXCEPT FOR A SHORT PERIOD OF TIME OF ONE MONTH, TWO MONTHS, THREE MONTHS, SOME SEVEN YEARS LATER, SIX YEARS LATER, FIVE YEARS LATER AND HE DID NOT RECEIVE THIS MEDICATION THROUGH THIS TIME AND HE DID NOT RECEIVE A LOT OF COUNSELING, IF ANY, WHAT IS THE CHANCES OF HIS PARANOID SCHIZOPHRENIA BEING IN REMISSION?

A. VERY LITTLE.

Q. THERE IS A CHANCE?

A. THEORETICALLY.

Q. DO YOU BELIEVE THERE IS A CHANCE?

A. THEORETICALLY A VERY LOW CHANCE. I DON'T BELIEVE IT IS PROBABLE.

Q. HIGHLY UNLIKELY?

A. HIGHLY UNLIKELY.

Q. IF YOU HAVE SOMEBODY THAT IS CUTTING THEMSELVES, [RT 429] PUTTING CROSSES ON THEIR FOREHEAD, SCRATCHES ON THEIR ARMS, BURNING THEMSELVES WITH CIGARETTES, TAKING OFF TATTOOS, SUPERFICIAL CUTS, DO YOU FEEL THESE ARE, IF HE IS A PARANOID SCHIZOPHRENIC, WOULD THESE BE SUICIDAL ATTEMPTS?

A. NO.

Q. BECAUSE HE IS NOT IN YOUR OPINION NOT REALLY CAPABLE OF THE DEPRESSION OR IS NOT, ALTHOUGH THEY WOULD COMMIT SUICIDE, THEY WOULD DO IT IN A DIFFERENT WAY?

A. YES.

Q. HOWEVER, THEY ARE HURTING THEMSELVES?

A. CORRECT.

Q. IS THAT CONSISTENT WITH A PARANOID SCHIZOPHRENIC?

A. YES, I WOULD LIKE TO ADD THOUGH THEIR SENSE OF PAIN IS SIGNIFICANTLY, FROM THE SKIN, IS USUALLY SIGNIFICANTLY LESS THAN NORMAL.

Q. IS THIS NORMALLY REFERRED TO AS SELF-MUTILATION?

A. YES.

Q. AND THIS IS VERY COMMON WITH PARANOID SCHIZOPHRENICS?

A. MUCH MORE COMMON WITH THOSE WHO ARE INCARCERATED; LESS COMMON WITH THOSE WHO ARE NOT INCARCERATED.

Q. WHY IS THAT IN YOUR OPINION?

A. BECAUSE THE INCARCERATED PARANOID SCHIZOPHRENIC HAS NO OTHER HUMAN TARGET TO VENT HIS ANGER AND HIS RAGE UPON OTHER THAN HIMSELF. HE BECOMES HIS OWN TARGET.

Q. SO HE PUTS UP WITH THIS PAIN, HE IS NOT [RT 430] CONSCIOUSLY THINKING OF THE PAIN?

A. IT IS TRANSFORMED INTO SOMETHING ELSE. HE FEELS IT BUT IT IS INTERPRETED AS SOMETHING ELSE.

Q. SO THIS PAIN IS SYMBOLIC OF SOMETHING ELSE?

A. YES.

Q. AND THAT COULD BE A VARIETY OF THINGS?

A. YES.

Q. DR. GOLD, ARE YOU FAMILIAR WITH MR. MEDINA?

A. I KNOW HIM AS FRANK ROCCO, THE SAME MAN.

Q. AND DID YOU KNOW MR. ROCCO, AS YOU CALL HIM, MR. MEDINA, IN '78, '79?

A. YES.

Q. AND WHAT WAS YOUR OCCUPATION AND EMPLOYMENT IN '78 AND '79 WHEN YOU KNEW MR. MEDINA AS FRANK ROCCO?

A. IT WAS A CHIEF CONSULTANT TO THE ARIZONA CORRECTIONAL SYSTEM, CHIEF PSYCHIATRIC CONSULTANT.

Q. FOR HOW LONG DID YOU KNOW OR – WELL, WHAT PERIOD OF TIME DO YOU KNOW MR. ROCCO OR MR. MEDINA?

Q. [sic] TO THE BEST OF MY RECOLLECTION SOMETIME TOWARD THE END OF 1977 INTO SPRING OF 1979.

Q. AND DO YOU – DID YOU EVALUATE MR. MEDINA AT THAT TIME?

A. I DID.

Q. AND IN THIS APPROXIMATE YEAR TIME, HOW OFTEN DID YOU SEE MR. MEDINA?

A. THAT COULD VARY. IF THERE WERE A NEED REPORTED [RT 431] BY HIS COUNSELOR OR HIS GUARDS, I COULD SEE HIM EACH TIME I MADE ROUNDS, WHICH COULD BE TWICE A WEEK. BUT I THINK TO MY RECOLLECTION I MIGHT HAVE SEEN HIM APPROXIMATELY ONCE A WEEK, SOMETIMES ONCE EVERY TWO WEEKS.

Q. AND DID YOU TEST HIM?

A. HE WAS TESTED AT THE PRISON. IF YOU ARE TALKING ABOUT PSYCHOLOGICAL TESTS, HE RECEIVED SOME BASIC TESTS THERE. I DID NOT PUT HIM THROUGH ANY FORMAL PSYCHOLOGICAL TESTS, NO.

Q. AND AT THAT TIME OF '78, '79, HOW LONG HAD YOU BEEN IN THIS FIELD, IN THIS AREA?

A. SINCE 1962.

Q. AND DID YOU MAKE A DETERMINATION AS TO MR. MEDINA OR MR. ROCCO AT THAT TIME OF WHETHER OR NOT HE WAS A PARANOID SCHIZOPHRENIC?

A. I DID.

Q. AND WHAT WAS YOUR CONCLUSION?

A. HE WAS.

* * *

[RT 432] Q. WHEN WAS THE LAST TIME YOU SAW AND TALKED TO MR. MEDINA?

A. LAST NIGHT.

Q. THAT IS THE FIRST TIME YOU SAW HIM FROM '78, '79?

A. CORRECT.

Q. DID YOU FIND HIM TO BE A MALINGERER?

A. NO

Q. DID YOU FIND HIM TO BE – WHAT DO YOU FIND HIM TO BE?

A. ABOUT THE SAME AS WHEN I SAW HIM LAST TIME. PARANOID SCHIZOPHRENIC. CHRONIC.

Q. YOU DON'T FIND HIM TO BE DEPRESSED?

A. NO.

Q. YOU DON'T FIND HIM TO BE SUICIDAL?

A. NO.

Q. DO YOU FIND HIM TO BE COMPETENT TO ASSIST HIS ATTORNEYS?

A. NO.

* * *

Q. WELL, MR. MEDINA CAPABLE OF FORMING – YOU ARE NOT BRAIN DEAD JUST BECAUSE YOU ARE DIAGNOSED OR ARE A [RT 434] PARANOID SCHIZOPHRENIC; IS THAT CORRECT?

A. ABSOLUTELY NOT.

Q. YOU CAN READ?

A. YES.

Q. YOU CAN TALK?

A. YES.

Q. YOU CAN RECOGNIZE PEOPLE?

A. YES.

Q. AND THAT IS NOT INCONSISTENT WITH BEING A PARANOID SCHIZOPHRENIC?

A. CORRECT.

Q. AND THAT IS NOT INCONSISTENT WITH BEING INCOMPETENT TO STAND TRIAL?

A. CORRECT.

Q. AND THE INCOMPETENCY DOESN'T COME FROM THESE FACTORS?

A. CORRECT.

Q. THE INCOMPETENCY COULD COME FROM THE PSYCHOTIC DENIAL; IS THAT CORRECT?

A. IT COULD.

Q. DO YOU BELIEVE THAT IN MR. MEDINA'S CASE THAT THAT IS WHERE IT IS COMING FROM?

A. I DO.

MR. STONE: I HAVE NO FURTHER QUESTIONS AT THIS TIME.

THE COURT: MR. BROWN.

[RT 435] CROSS EXAMINATION

BY MR. BROWN: Q. DO PSYCHIATRISTS GET FOOLED WITH RESPECT TO THIS MALINGERING IN THE AREA OF PSYCHIATRY?

A. YES.

* * *

[RT 456] Q. AND YOU ARE BASING THAT OPINION UPON YOUR NUMBER OF EXAMINATIONS IN 1977, '78 AND '79; IS THAT CORRECT?

A. PLUS THE EXAMINATION LAST NIGHT.

Q. PLUS THE ONE-HOUR EXAMINATION LAST NIGHT?

A. CORRECT.

Q. ANYTHING ELSE?

A. NO.

[RT 457] Q. WELL, THE MATERIAL YOU HAVE GOT IN FRONT OF YOU; IS THAT CORRECT?

A. YES. THAT IS CORRECT.

* * *

[RT 463] BY MR. BROWN: Q. DOES THIS APPEAR TO BE AN OFFICIAL DOCUMENT OF THE ARIZONA STATE HOSPITAL CONCERNING FRANK ROCCO?

A. IT WOULD APPEAR TO BE.

Q. FRANK ROCCO'S NAME IS ON IT, HIS NUMBER IS ON THERE; IS THAT CORRECT?

A. THAT'S RIGHT.

Q. AND DOES THAT INDICATE TO YOU THAT THE DIAGNOSIS BY DR. MATTY AND DR. BAKER IS THAT OF ANTISOCIAL PERSONALITY AND THAT THERE IS NO EVIDENCE OF PSYCHOSIS OR ANY SERIOUS MENTAL PROBLEM?

A. THAT IS WHAT IS INDICATED.

Q. THEN WERE YOU AWARE THAT SHORTLY AFTER THAT ON JANUARY 11TH, 1978, DR. MATTY, WHILE WORKING WITH THE DEFENDANT, CONSIDERED SYMPTOMS OF FAKING AND CAME TO A WORKING DIAGNOSIS; WERE YOU AWARE OF THAT?

A. I HAVE AN ENTRY HERE FOR THAT DATE BY DR. MATTY. MR. BROWN: AND MAY I APPROACH THE WITNESS, YOUR HONOR?

THE COURT: YES.

BY MR. BROWN: Q. ON THAT PARTICULAR DATE, IS IT FAIR TO SAY THAT DR. MATTY CONCLUDED THAT ALTHOUGH FAKING, HIS MENTAL SYMPTOMS ARE CONCERNED TO BE THE DIFFERENTIAL DIAGNOSIS AND WILL BE FURTHER OBSERVED, THE WORKING DIAGNOSIS AT THIS TIME IS SCHIZOPHRENIA, PARANOID TYPE; IS THAT CORRECT?

A. RIGHT.

Q. AND THEN ARE YOU ALSO AWARE THAT SHORTLY AFTER THAT DR. MATTY RETRACTED FROM THAT WORKING DIAGNOSIS AND –

[RT 454] THE COURT: EXCUSE ME, MR. BROWN. MR. – WITNESSES ARE EXCUSED IN THIS CASE. HAVE TO ASK YOU TO REMAIN OUTSIDE SINCE YOU ARE STILL A WITNESS.

BY MR. BROWN: Q. ON FEBRUARY 7, 1976, ARE YOU AWARE THAT DR. MATTY FORMED THE OPINION AND CAME TO THE DIAGNOSIS THAT THE DEFENDANT IS AN ANTISOCIAL PERSONALITY?

A. I AM AWARE.

Q. AND THAT IS THE CASE, ISN'T IT, THAT IS THE CASE, SHE DID COME TO – HE DID COME TO THAT CONCLUSION?

A. I BELIEVE SO.

Q. AS FAR AS YOU KNOW, DR. MATTY AND DR. BAKER ARE FINE, OUTSTANDING PSYCHIATRISTS IN THEIR FIELD; IS THAT CORRECT?

A. AS FAR AS I KNOW.

Q. NOW, YOU HAVE INDICATED THAT YOU WERE AWARE OF DR. TUCHLER?

A. TUCHLER.

Q. ARE YOU AWARE OF DR. TUCHLER'S DIAGNOSIS IN THIS PARTICULAR CASE?

A. YES.

Q. WHAT IS THAT, SIR?

Q. NO SIGN OF A MENTAL DISORDER. WAS CONSIDERED IRRITABLE, ARGUMENTATIVE AND PROVOCATIVE IS WHAT I HAVE AS AN ENTRY. 11-16-78.

Q. DR. TUCHLER IS A PSYCHIATRIST THAT IS KNOWN THROUGHOUT THE UNITED STATES; ISN'T THAT CORRECT?

[RT 465] A. CORRECT.

Q. WHAT IS THE BACKGROUND OF DR. TUCHLER?

A. I AM NOT AWARE.

Q. YOU ARE AWARE HE IS KNOWN THROUGHOUT THE UNITED STATES?

A. I AM AWARE OF THAT.

Q. IN WHAT RESPECT IS HE KNOWN THROUGHOUT THE UNITED STATES?

A. AS A FORENSIC PSYCHIATRIST.

Q. DR. TUCHLER'S OPINION ON NOVEMBER 17TH, 1979, IS THAT THE DEFENDANT BE DISCHARGED WITHOUT A MENTAL DISEASE, THERE IS NO MENTAL DISORDER; ISN'T THAT CORRECT?

A. I DON'T HAVE THAT REPORT.

MR. BROWN: MAY I APPROACH THE WITNESS?

THE COURT: YES. YOU DON'T HAVE TO ASK EACH TIME.

MR. BROWN: YES, YOUR HONOR.

BY MR. BROWN: Q. COULD YOU JUST READ THAT ENTRY TO THE JURY, PLEASE?

A. "THE PATIENT PRESENTED AS A CANTANKEROUS, AT TIMES EXPLOSIVE AND FREQUENTLY A HISTRIONIC PATTERN OF BEHAVIOR DURING HIS HOSPITALIZATION. HE APPEARED TO BE AT TIMES PUTTING ON A GRANDSTAND PLAY, WAS LOUD, VERBAL AND ABUSIVE, CONTROLLING THE STAFF TO THE LIMIT OF THEIR TOLERANCE. HE SHOWED NO SIGNS OF A MENTAL DISORDER, WAS CONSIDERED IRRITABLE, ARGUMENTATIVE AND PROVOCATIVE."

Q. AND THAT IS NOVEMBER 17TH, 19 ___

[RT 466] A. '79 LOOKS LIKE. SIGNED BY DR. TUCHLER.

Q. ARE YOU ALSO AWARE OF A DIAGNOSIS BY DR. MICHAEL CLEARY?

A. YES.

Q. WHERE IS DR. MICHAEL CLEARY; WHERE WAS HE EMPLOYED AT THAT TIME?

A. I AM NOT AWARE.

Q. WAS HE AT THE STATE HOSPITAL?

A. I BELIEVE HE WAS.

Q. AND ON APRIL 20TH, 1979, DR. CLEARLY [sic] DIAGNOSED THE DEFENDANT AS PERSONALITY DISORDER, ANTISOCIAL PERSONALITY, PROGNOSIS POOR; IS THAT CORRECT?

A. CORRECT.

Q. ALL OF THOSE DOCTORS DISAGREED WITH YOUR DIAGNOSIS IN THIS CASE, DON'T THEY?

A. THEY WOULD APPEAR TO.

* * *

[RT 467] Q. IS IT INCONSISTENT WITH A PARANOID SCHIZOPHRENIC TO MAKE AN ESCAPE ATTEMPT FROM A PLACE THAT HE IS CONFINED TO?

A. NO.

Q. WHY IS THAT?

A. THEY FEEL THEY ARE JUSTIFIED IN OBTAIN-'NG THEIR FREEDOM. THEY ARE BEING ILLEGALLY HELD TO BEGIN WITH.

Q. I WOULD IMAGINE THEN IF ONE COULD RUN A CORPORATION, ONE COULD CERTAINLY PLAN AN ESCAPE?

A. YES.

Q. BEING A PARANOID SCHIZOPHRENIC YOU COULD PLAN THIS ESCAPE PRETTY DETAILED?

A. YES.

* * *

[RT 471] Q. IF INDEED IN '71 AND '72 THESE DOCTORS ARE RIGHT AND HE WAS PARANOID SCHIZOPHRENIC IN 1971, '72, THEN HE IS TODAY, HE WAS IN '78, HE WAS IN '71, '2, '3, '4 UP TO THIS PRESENT DATE?

[RT 472] A. CORRECT.

Q. BECAUSE IN YOUR OPINION THERE IS NO CURE FOR THAT?

A. CORRECT.

Q. HE CAN BE IN REMISSION AT TIMES?

A. CORRECT.

Q. BUT THAT DOESN'T MEAN THAT IS WHEN HE BECAME A PARANOID SCHIZOPHRENIC?

A. CORRECT.

Q. ON THIS SAME PAGE AND THIS SAME DOCUMENT IS A DATE 10-2-68, SAYS, "CHINO, CALIFORNIA." SAYS, "DIAGNOSTIC IMPRESSION." WOULD YOU READ WHAT IT SAYS?

A. "SOCIOPATHIC PERSONALITY DISTURBANCE, DISSOCIAL REACTION."

Q. IS THAT INCONSISTENT WITH BEING A PARANOID SCHIZOPHRENIC?

A. NO, IT IS NOT INCONSISTENT.

Q. WE TALKED A LITTLE BIT ABOUT MISDIAGNOSIS AND WE TALKED A LITTLE BIT ABOUT MR. BROWN BROUGHT UP THE SURVEY DONE, IN FACT, CERTAIN PEOPLE GOT IN, HAD A LITTLE DIFFICULT TIME GETTING OUT FROM A HOSPITAL DUE TO A FAKE SYMPTOM; IS THAT CORRECT?

A. CORRECT.

Q. DO ALL PSYCHIATRISTS AGREE ON EVERY ISSUE?

A. NO, THEY DO NOT.

Q. DO ALL PSYCHIATRISTS AGREE WITH EVERY SYMPTOM AND [RT 473] WHAT IT MEANS?

A. THEY DO NOT.

Q. DO YOU HAVE A BETTER SHOT AT MAKING A GOOD DIAGNOSIS OVER A PERIOD OF TIME THAN IN THAT SHORT ONE HOUR?

A. OVER A LONGER PERIOD OF TIME, OF COURSE.

* * *

[RT 474] Q. IF MR. MEDINA WAS NOT PARANOID SCHIZOPHRENIC, WOULDN'T HE HAVE A REASON TO MALINGER?

A. YES.

* * *

Q. DID HE MENTION HIS SIZE TO YOU YESTERDAY?

A. YES.

[RT 475] Q. WHAT DID HE SAY ABOUT HIS SIZE?

A. TOO LARGE.

Q. DO [sic] HE HAVE A SOLUTION FOR THAT, DID HE TELL YOU?

A. YES, HE SHOULD HAVE HIS ARMS AND LEGS CUT DOWN.

Q. IS THAT CONSISTENT WITH A PARANOID SCHIZOPHRENIC?

A. YES.

* * *

[RT 476] Q. IS IT INCONSISTENT WITH A PARANOID SCHIZOPHRENIC TO WANT TO GO TO A DIFFERENT ENVIRONMENT?

A. IT IS NOT INCONSISTENT.

Q. IT IS INCONSISTENT FOR HIM – FOR A PARANOID TO [RT 477] WANT TO GO FROM A PRISON TO A HOSPITAL?

A. IT IS NOT INCONSISTENT.

Q. IN FACT, IN – YOU DID STATE YOU HAVE A PRIVATE PRACTICE?

A. YES.

Q. DON'T PARANOID SCHIZOPHRENICS COME IN AND ASK FOR TREATMENT VOLUNTARILY?

A. CORRECT.

Q. AND AREN'T THEY TRYING TO GET THEMSELVES TOGETHER MAYBE?

A. CORRECT.

Q. DON'T THEY REALIZE THERE IS A PROBLEM, SOMETHING IS NOT RIGHT?

A. SOME DO.

Q. AND THE ONES THAT HAVE LESS CONTROL OF THEIR LIVES, COULD IT BE MORE CONFUSION IN THEIR LIVES IF YOU ARE A PARANOID SCHIZOPHRENIC?

A. YES.

Q. IN FACT, PROBABLY BE MORE IF YOU HAD NO CONTROL?

A. CORRECT.

[RT 478] * * *

Q. DID HE TALK ABOUT CUTTING HIMSELF?

A. WHICH TIME?

Q. AT ALL, FIRST OF ALL?

A. I ASKED HIM ABOUT SOME OF THE SELF-MUTILATIONS.

Q. WHAT DID HE SAY; DID HE RECALL THOSE INCIDENTS?

A. VERY VAGUELY.

Q. COULD YOU GIVE YOU [sic] REASONS WHY HE DID IT?

A. NO.

MR. STONE: THANK YOU.

RECROSS EXAMINATION

BY MR. BROWN: Q. THAT IS CONSISTENT WITH EVERYTHING YOU HAVE KNOWN ABOUT THE DEFENDANT FROM THE STATE PRISON IN ARIZONA; ISN'T THAT RIGHT?

A. YES, I HAVEN'T HEARD ANYTHING THAT IS [RT 479] INCONSISTENT.

Q. IN ARIZONA WHEN HE STABBED THOSE THREE OTHER INMATES, HE REFUSED TO TALK ABOUT THAT, DIDN'T HE?

A. I BELIEVE SO.

Q. AND THE TIME THAT HE GOT IN THE FIGHT WITH THE ARYAN BROTHERHOOD FELLOW IN ARIZONA AND HE JUMPED THE FENCE AND TRIED TO KILL THAT GUY, HE REFUSED TO TALK ABOUT THAT, DIDN'T HE?

A. I BELIEVE SO.

Q. HE CONSISTENTLY DUMMIES UP AFTER HE COMMITS A CRIME AND DOESN'T WANT TO TALK ABOUT IT; ISN'T THAT CORRECT?

ARE YOU HAVING TROUBLE WITH THE DUMMY UP?

A. I THINK THE PROBLEM HERE IS WHETHER HE CAN RECALL AND REFUSED TO OR WHETHER

HE WAS NOT CAPABLE OF RECALLING. I PREFER TO BELIEVE HE IS NOT CAPABLE OF RECALLING.

* * *

Q. WHEN HE COMMITS AN AGGRAVATED CRIME LIKE RAPE OR TRYING TO KILL THE THREE FELLOW INMATES, TRYING TO DROP THE TRASH CAN ON THE OFFICER'S HEAD, TRYING TO BEAT UP THE ARYAN [RT 480] BROTHERHOOD FELLOW, THOSE KIND OF THINGS THAT ARE SERIOUS, HE WON'T TALK ABOUT BECAUSE YOU ARE SAYING HE DOESN'T REMEMBER?

A. IF HE WAS PSYCHOTIC AT THE TIME, HE PROBABLY WOULD NOT RECALL.

MR. BROWN: THANK YOU, DOCTOR.

THE COURT: ONE MORE TIME AROUND.

REDIRECT EXAMINATION

BY MR. STONE: Q. ONE LEADS TO ANOTHER. AT LEAST OUR MINDS ARE STILL WORKING TO SOME DEGREE.

DURING THESE INCIDENTS MR. BROWN HAS JUST MENTIONED, WE HAVE PREVIOUSLY, THESE WERE AT ARIZONA WHICH WAS A TIME PERIOD OF '78, '79, RANDOMLY STABBING THREE PEOPLE, THROWING THE TRASH CAN, NOT TALKING, IN FACT ONE OF THE ALLEGED INCIDENTS HE WAS CONVICTED OF, THIS WAS ALL AFTER '68, '71 AND '72 WHEN HE WAS DIAGNOSED AS BEING A PARANOID SCHIZOPHRENIC; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. THESE DENIALS ARE NOT INCONSISTENT WITH BEING A PARANOID SCHIZOPHRENIC?

A. CORRECT.

Q. THEY DIDN'T GET HIM ANYWHERE AS MALINGERING, HE STILL WENT TO PRISON AND STILL WAS CONVICTED AND STILL WENT TO COURT ON THE RAPE CHARGE; IS THAT CORRECT?

A. ALSO WENT TO THE STATE HOSPITAL.

* * *

[RT 487] [DIRECT EXAMINATION OF DR. ECHEANDIA] Q. ALL RIGHT. AND SO I TAKE IT FROM THE INFORMATION THAT YOU DID RECEIVE, DID YOU FORM AN OPINION AS TO ANY SCHIZOPHRENIC PERSONALITY DISORDER?

A. WELL, AS I TESTIFIED YESTERDAY, THAT WAS A STRONG CONSIDERATION AT ONE POINT, BASED ON PREVIOUS TESTIMONY AND ALSO TRYING TO INTERPRET HIS BEHAVIOR WITH US IN THE JAIL.

THERE WERE A NUMBER OF SYMPTOMS THAT HE WAS DISPLAYING THAT COULD BE INTERPRETED AS SUGGESTIVE OF SCHIZOPHRENIC.

I ALSO SAID THAT HE'S SOMETHING OF A PUZZLE DIAGNOSTICALLY, BECAUSE HE DOES PRESENT SUCH A WIDE RANGE OF SYMPTOMS, AND AT VARIOUS TIMES CAN LOOK QUITE LUCID AND CLEAR AND OTHER TIMES LOOK QUITE DISORGANIZED AND CONFUSED.

SO BECAUSE OF THE LIMITED CONTACT THAT WE HAVE HAD WITH HIM, AND THE DIFFICULTY IN ASSESSING HIM, WE STILL HAVE SOME QUESTIONS.

THIS IS A LONG WAY OF SAYING THAT WE HAVE CONSIDERED PARANOID SCHIZOPHRENIC AS A DIAGNOSIS. IT IS NOT AT THE MOMENT MY PRIMARY DIAGNOSIS, BUT I WOULD STILL CONSIDER IT TO BE SOMETHING, YOU KNOW, AS A POSSIBILITY, IF WE HAD ADDITIONAL INFORMATION.

Q. ALSO, DOCTOR, THE FACT IS THAT YOU'VE CONSIDERED MALINGERING, AS TESTIFIED TO YESTERDAY?

A. YES.

Q. IN FACT, DO YOU FEEL THAT IT'S A POSSIBILITY, OR DO YOU HAVE AN OPINION ON THAT, AS FAR AS MR. MEDINA?

A. I THINK THAT'S A POSSIBILITY. I DON'T BELIEVE THAT HIS ENTIRE SYMPTOM PICTURE COULD BE ACCOUNTED FOR BY MALINGERING.

IT WOULD APPEAR TO ME THAT MR. MEDINA CAN AT TIMES BE QUITE MANIPULATIVE. IT IS MY BELIEF THAT IS NOT ENTIRELY THE EXPLANATION FOR HIS BEHAVIOR, HOWEVER.

* * *

[RT 500] Q. HAVE YOU HAD A CHANCE TO CONTEMPLATE AND THINK ABOUT WHETHER OR NOT YOU CAN FORM AN OPINION AS TO WHETHER OR NOT THE DEFENDANT IS CAPABLE OF STANDING TRIAL HERE?

THE WITNESS: I DON'T BELIEVE THAT I'M – I CAN MAKE THAT RECOMMENDATION. I HAVEN'T EVEN SPOKEN TO MR. MEDINA, AND [RT 501] I CERTAINLY HAVEN'T EVALUATED HIM ALONG THOSE LINES.

* * *

[RT 504] Q. AND HAVE YOU ALSO HAD THE IMPRESSION AT SOME TIME OR ANOTHER THAT THE DEFENDANT WAS ATTEMPTING TO DO THINGS FOR THE SAKE OF HIS DEFENSE IN THIS CASE?

A. I'D HAVE TO SAY, IN ALL HONESTY, THAT IT'S BEEN DIFFICULT FOR ME TO INTERPRET MR. MEDINA'S MOTIVES. IT DEPENDS ON WHETHER YOU THINK THAT THE BEHAVIOR IS PART OF MENTAL ILLNESS OR PART OF A MANIPULATION.

I HAVE HEARD, ON OCCASION, THAT HE WILL HAVE AN INCIDENT PRIOR TO COMING TO COURT. I HAVE NOT FORMED AN OPINION AS TO WHETHER THAT IS STRICTLY SPEAKING AN ATTEMPT TO GET OUT OF COURT OR AS A RESULT OF THE STRESS INVOLVED IN GOING TO COURT.

SO MY ANSWER IS THAT I'M NOT SURE.

Q. DO YOU RECALL INDICATING, IN A CHRONO – ARE [RT 505] THESE CALLED CHRONOS? THESE ARE YOUR RECORDS THAT INITIALLY CAME TO US?

A. I DON'T CALL THEM CHRONOS.

Q. THIS HAS A DATE OF APRIL 9, 1976.

A. WE JUST CALL THEM PROGRESS NOTES.

Q. WOULD YOU JUST LOOK AT THIS?

A. YES.

Q. WOULD YOU TELL US WHAT YOU WERE THINKING ABOUT WHEN YOU ENTERED THAT ONE?

A. SURE.

Q. SURE.

A. WELL, I THINK IN SOME WAYS THIS NOTE SORT OF SUMS UP MY CONCERNS WITH THIS PATIENT. IT SAID HERE AT THE TIME, IT'S UNCLEAR WHETHER HE HAS – IN A SENSE, I WAS SAYING WHETHER HE'S PARANOID AND SUFFERING FROM SOME OTHER KINDS OF ILLNESS OR AS IS THE POSSIBILITY HE MAY BE ADOPTING BIZARRENESS, ILLNESS FOR THE SAKE OF HIS DEFENSE. THIS WAS THE INITIAL TIME I SAW HIM.

I TOOK INTO ACCOUNT THE POSSIBILITY THAT GIVEN THE NATURE OF THE CHARGES, CERTAINLY ANYBODY MIGHT BE CONSIDERED TO MALINGER A MENTAL ILLNESS. WE CONSIDER THAT IN EVERY CASE, PARTICULARLY OF A CASE WITH A SERIOUS NATURE.

I FELT AT THAT TIME I REALLY DIDN'T KNOW WHAT WAS GOING ON, WHETHER HE WAS DOING THAT OR NOT. SO I LEFT IT OPEN AS A POSSIBILITY TO CONSIDER LATER.

Q. AND THEN AS YOU'VE HAD CHANCES TO CONSIDER LATER, [RT 506] YOU'VE COME TO THE PRIMARY DIAGNOSIS THAT THE DEFENDANT IS AN

ANTISOCIAL PERSONALITY AND BASICALLY JUST A MEAN INDIVIDUAL?

A. NO. THAT'S NOT CORRECT. MY PRIMARY DIAGNOSIS IS BORDERLINE PERSONALITY DISORDER, WHICH IS SOMETHING QUITE DIFFERENT. HE HAS SOME ANTISOCIAL FEATURES. I WOULD NOT SAY IT AS SIMPLE AS HE'S JUST A MEAN INDIVIDUAL.

* * *

[RT 507] KAUSHAL SHARMA, CALLED AS A WITNESS BY THE DEFENDANT, WAS SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU STATE YOUR FILL [sic] NAME, AND SPELL THE LAST FOR THE COURT, PLEASE?

THE WITNESS: KAUSHAL, K-A-U-S-H-A-L. SHARMA, S-H-A-R-M-A.

DIRECT EXAMINATION

BY MR. KREBER: Q. WHERE ARE YOU EMPLOYED?

A. I'M SELF-EMPLOYED.

Q. AND WHAT'S YOUR OCCUPATION?

A. I'M A MEDICAL DOCTOR.

Q. AND WHAT DO YOU SPECIALIZE IN?

A. FORENSIC PSYCHIATRY.

* * *

[RT 510] Q. BUT I TAKE IT YOU HAD A DIFFICULT TIME IN EVALUATING MR. MEDINA BECAUSE YOU FOUND HIM TO BE VERY UNCOOPERATIVE?

A. THAT IS TRUE.

Q. AND DID HE ADVISE YOU AS TO WHY HE WAS SO UNCOOPERATIVE TO YOU?

A. HE DID NOT DIRECT HIS POINT TO WHAT I WAS ASKING, BUT HE KEPT ON STATING THAT HE WAS PARANOID AND HE COULD NOT TALK TO ME.

* * *

[RT 512] MR. SHARMA, YOU FOUND THAT IF MR. MEDINA WANTS TO COOPERATE WITH HIS ATTORNEYS HE CAN, IF HE CHOOSES TO? IS [RT 513] THAT BASICALLY ONE OF YOUR ANALYSES?

A. YES.

Q. HOWEVER, YOU FOUND THAT HE IS NOT COOPERATING BUT IT MAY BE BECAUSE HE VOLUNTARILY IS REFUSING TO DO SO?

A. THAT IS CORRECT.

* * *

Q. NOW, ALSO, AT THE END YOU INDICATED THAT MR. MEDINA WAS NONCOOPERATIVE AND THIS WOULD HAVE MADE YOUR ASSESSMENT RATHER DIFFICULT; IS THAT CORRECT?

A. THAT IS CORRECT.

Q. BUT THE INFORMATION THAT WAS AVAILABLE TO YOU AT THE TIME WOULD SUGGEST YOU'D FAVOR COMPETENCY RATHER THAN INCOMPETENCY?

A. THAT IS TRUE.

Q. SO I TAKE IT IT'S SOMEWHAT CLOSE IN YOUR DECISION VERSUS COMPETENCY OR INCOMPETENCY, IN READING THAT?

A. NO, IT IS NOT.

Q. YOU ARE FULLY, COMPLETELY SATISFIED AS TO COMPETENCY?

A. I WOULD NOT SAY THAT I'M 100 PERCENT SATISFIED, BECAUSE I WOULD PREFER TO BE ABLE TO TALK TO SOMEBODY BEFORE I CAN REACH AN OPINION.

HOWEVER, WHEN I TRIED TO GATHER ALL THE INFORMATION ON THE SIDE OF COMPETENCY AND INCOMPETENCY, I [RT 514] BELIEVE THE SCALE ON THE SIDE OF COMPETENCY, IN MY OPINION, IS A LOT HEAVIER THAN ON THE SIDE OF INCOMPETENCY.

* * *

[RT 521] Q. AND DO YOU THINK THAT YOU HAD ENOUGH TIME TO INTERVIEW MR. MEDINA AND STILL MAKE AN EVALUATION?

A. I BELIEVE MY PERSONAL CONTACT WITH MR. MEDINA WAS LESS THAN WHAT I WOULD HAVE PREFERRED.

Q. FROM THE PROFESSIONAL STANDARDS THAT YOU SET FOR YOURSELF?

A. THAT IS TRUE.

Q. I TAKE IT THEN IF COOPERATION WOULD HAVE BEEN MORE PREVELANT [sic], YOU WOULD HAVE PROBABLY GONE BACK TO SEE HIM MORE TIMES?

[RT 522] A. YES.

Q. AND YOU DID NOT RETURN AFTER JUNE 6TH, BECAUSE YOU FELT THAT YOU WEREN'T GETTING ANYWHERE AS FAR AS COOPERATION?

A. THAT IS TRUE.

Q. WELL, ON THE COOPERATION STANDPOINT, YOU FOUND THAT MR. MEDINA, NO MATTER WHO THE ATTORNEYS MAY BE REPRESENTING HIM, THAT HE IS MOST LIKELY NOT TO COOPERATE?

A. I BELIEVE SO.

Q. AND YOU STILL FIND THAT TO BE A VOLUNTARY BASIS?

A. YES, I DO.

* * *

Q. AND YOU SEE A LOT OF PEOPLE IN THE JAIL?

A. YES, I DO.

Q. AND I TAKE IT YOU CAN TELL MALINGERING OR AT LEAST YOU HAVE A PRETTY GOOD HANDLE ON IT?

A. I BELIEVE SO, YES.

[RT 523] Q. BUT NEVERTHELESS, YOU CAN BE TRICKED, TOO, I TAKE IT?

A. YES. I'VE BEEN WRONG MORE THAN ONCE.

Q. MORE THAN ONCE?

A. YES.

Q. IN MR. MEDINA'S CASE, DID YOU FIND MALINGERING?

A. YES, I DID.

* * *

Q. ALL RIGHT. NOW, WHAT DID YOU FEEL, IN YOUR OPINION THEN? THAT MR. MEDINA IS VOLUNTARILY NOT COOPERATING? [RT 524] HOW CAN YOU MAKE THAT DETERMINATION BASED ON JUST WHAT HE TELLS YOU?

A. BASED ON WHAT HE TELLS ME I SUSPECTED VERY STRONGLY THAT HE WAS MALINGERING. BUT THAT IN ITSELF IS NOT ENOUGH. I REVIEWED THE PAST HISTORY AND TALKED TO THE STAFF AT THE JAIL, TO OBTAIN SOME INFORMATION.

WHEN I PUT ALL PIECES OF THE PUZZLE TOGETHER, INCLUDING MY OWN OBSERVATIONS, HIS HISTORY GOING BACK TO 1971, THAT'S 15 YEARS, AND MY OBSERVATIONS AND INFORMATION FROM WHAT HE HAS BEEN LIKE AT THE COUNTY JAIL, AT ORANGE COUNTY JAIL, I THEN PUT ALTOGETHER AND CAME TO THE CONCLUSION THAT HE WAS FAKING.

Q. NOW, IN THE CASE – AND YOU MIGHT NOW KNOW THIS BUT IN THE CASE OF DR. GOLD, IF HE TESTIFIED THAT MR. MEDINA WAS INCOMPETENT AND THAT HE WAS ABLE TO REVIEW HIS RECORDS OF '77, '78 AND '79, AND WAS TO HAVE A ONE-HOUR INTERVIEW WITH MR. MEDINA ON THE 15TH OF JULY, WHICH COULD HAVE BEEN YESTERDAY, DO YOU FIND IT UNUSUAL THAT DR. GOLD WOULD MAKE THAT OPINION, BASED UPON HIS PERSONAL VISIT WITH MR. MEDINA?

A. NO, I WOULD NOT FIND IT UNUSUAL, NO.

Q. OKAY. NOW, WOULD IT BE – AND YOU HIT ON THIS SOMEWHAT.

BUT YOU HAVE NO QUARREL WITH THE FACT THAT DR. GOLD, IN '78, FOUND MEDINA TO BE SCHIZOPHRENIC BUT WAS IT IN REMISSION, IN YOUR OPINION?

[RT 525] A. DR. GOLD GAVE MORE THAN ONE DIAGNOSIS AT MORE THAN ONE TIME. SOMETIMES HE CALLED MR. MEDINA TO BE SCHIZOPHRENIC, OTHER TIMES TO BE, QUOTE, UNQUOTE, "HIGHLY DANGEROUS," OTHER TIMES IN REMISSION.

Q. AND YOU FOUND MR. MEDINA TO BE HIGHLY DANGEROUS?

A. I BELIEVE SO.

Q. AND THE FACT IS THAT DR. GOLD WOULD BE CALLED TO VISIT MR. MEDINA AFTER EACH PARTICULAR INCIDENT OF EITHER JAIL BREAK OR SHOOTING OR STABBING OR WHAT HAVE YOU, WOULD HE NOT?

WOULD YOU NOT SEE REPORTS BY DR. GOLD AFTER THESE INCIDENTS?

A. YES, THAT IS TRUE.

Q. NOW, YOU KNEW, I TAKE IT, FROM THE REPORTS, THAT MR. MEDINA HAD BEEN STABBED SOME 30 TIMES IN THE ORANGE COUNTY JAIL AROUND DECEMBER, MIDDLE OF DECEMBER OF '85?

A. YES.

Q. AND THE FACT THAT MR. MEDINA ADVISED YOU – OR DID HE TELL YOU THAT HE WAS PARANOID THAT HE WAS GOING TO BE KILLED IN JAIL?

A. NO. HE DID NOT TELL ME HE WAS GOING TO BE KILLED IN JAIL. HE JUST MADE A STATEMENT, "I'M PARANOID. I'M TAKING MEDICATION. I CAN'T TALK TO YOU."

Q. AND DID YOU FIGURE THE FACT THAT HE TOLD YOU HE'S PARANOID AND TAKING MEDICATION THAT HE MIGHT BE MALINGERING?

A. YES.

Q. BUT THE FACT IS THAT THE MEDICATION WAS BEING [RT 526] PRESCRIBED TO HIM BY PSYCHIATRISTS WITHIN THE JAIL?

A. YES.

Q. AND DID YOU TALK TO THE PSYCHIATRIST IN THE JAIL BEFORE FORMING YOUR OPINION, ORANGE COUNTY?

A. NO, I DID NOT.

* * *

[RT 538] Q. NOW, I NOTICED IN YOUR REPORT THAT YOU INDICATED, ON MORE THAN ONE OCCASION, THAT YOU WERE UNHAPPY ABOUT THE UNCOOPERATIVENESS OF MR. MEDINA. AND THE FACT IS THAT WITH NO COOPERATION IT JUST MADE IT EXTREMELY DIFFICULT FOR YOU TO MAKE AN ASSESSMENT?

A. THAT IS TRUE.

Q. IN THIS PARTICULAR TYPE OF SITUATION, WOULD IT BE IN YOUR PROFESSION MORE ADVISABLE, IF YOU'RE NOT HAVING [RT 539] COOPERATION, TO STEP DOWN OR HAVE ANOTHER PSYCHIATRIST GO IN AND GIVE IT A TRY? OR WHAT DO YOU DO IN THAT PARTICULAR SITUATION?

A. I BELIEVE THAT IF A PATIENT OR DEFENDANT I'M APPOINTED TO SEE IS NOT COOPERATING, IT IS MY PROFESSIONAL OBLIGATION TO TRY TO REACH AN OPINION, IF I CAN, BY TRYING TO ASSESS ALL FACTORS OF A LEVEL FROM ALL SOURCES; ALL REASONABLE FACTORS.

AND IF I CANNOT OBTAIN COOPERATION OF OTHERS IN OBTAINING INFORMATION, THEN I WOULD WRITE TO THE JUDGE SAYING, "NOBODY'S HELPING ME, GET SOMEBODY ELSE."

BUT JUST BECAUSE A DEFENDANT REFUSES TO COOPERATE IS NOT, IN MY OPINION, GOOD ENOUGH REASON FOR A FORENSIC PSYCHIATRIST TO SAY, "I CAN'T DO THE EVALUATION."

Q. NOW, ALSO, I TAKE IT IN YOUR REPORT THAT YOU SAID THERE'S BEEN A LONG LINE OF PHYSICAL VIOLENCE AND DISRUPTIVENESS WITH MR. MEDINA?

A. YES.

Q. NOW, ALSO, IF THE LONG LINE OF PHYSICAL VIOLENCE AND THE DISRUPTIVE NATURE OF MR. MEDINA, IF HE HAS NO CONTROL OVER THIS – AND THIS IS NOT TO EXCUSE CONDUCT, BUT WE'RE LOOKING AT EXCESS NOW – IS IT POSSIBLE THAT HE HAS NO CONTROL OVER THE FACT THAT HE CAN'T COOPERATE WITH THE ATTORNEYS?

A. IT IS POSSIBLE. YES.

* * *

[RT 543] Q. ALL RIGHT. LET ME ASK YOU. DURING THIS LONG LINE OF PHYSICAL VIOLENCE BY MR. MEDINA, GOING INTO THE '70'S, OTHER PSYCHIATRISTS HAVE GIVEN THE OPINION THAT MEDINA HAD A PARANOID SCHIZOPHRENIC BEHAVIOR.

AND ARE YOU IN AGREEMENT OR DISAGREEMENT WITH THAT?

A. I DISAGREE THAT MR. MEDINA'S BEHAVIOR COULD BE CONSIDERED AS SCHIZOPHRENIC.

Q. AND THAT MEANS BACK INTO THE '70'S AGAINST DR. GOLD AND OTHERS?

A. YES.

Q. BUT YOU DO AGREE, DO YOU NOT, THAT MR. MEDINA SUFFERS FROM A MENTAL IMPAIRMENT?

A. I DO.

Q. AND WE'RE TALKING ABOUT DEGREES OF PHYSICAL – OR STRIKE THAT – MENTAL IMPAIRMENT, ARE WE NOT?

A. NO, WE ARE TALKING ABOUT DEGREES. WE ARE ALSO TALKING ABOUT THE QUALITATIVE DIFFERENCE.

Q. NOW, IN YOUR OPINION, WOULD, SAY, DR. GOLD HAVE HAD THE OPPORTUNITY TO REVIEW THE PHYSICAL ATTACKS, PHYSICAL VIOLENCE BY MR. MEDINA AND SEEING MR. MEDINA OVER A PERIOD OF MONTHS BE BETTER ABLE TO GIVE AN EVALUATION OF MR. MEDINA, IF MR. MEDINA IS COOPERATING WITH DR. GOLD?

A. I BELIEVE EVERYTHING ELSE BEING EQUAL, IF DR. GOLD HAS SEEN MR. MEDINA OVER A LONG PERIOD OF TIME, HE [RT 544] SHOULD BE IN A BETTER POSITION.

* * *

[RT 561] Q. AND I TAKE IT THEN IF MR. MEDINA WAS MALINGERING AND HE WAS PLACED INTO THE ARIZONA STATE HOSPITAL AND ATTEMPTED TO ESCAPE OR WAS ASSAULTIVE IN THAT INSTITUTION, HOW WAS HE BETTERING HIS POSITION BY SAY GOING TO A HOSPITAL?

A. I'M NOT SURE I UNDERSTAND YOUR QUESTION.

Q. WELL, IF HE WAS IN A STATE HOSPITAL, AND HE IS COMMITTING CRIMES WITHIN THE STATE HOSPITAL, HE'S OBVIOUSLY NOT GOING TO STAY IN THAT INSTITUTION, HOW IS HE BETTERING HIMSELF? HE WAS ANTISOCIAL THERE, ALSO, WAS HE NOT?

A. YES, THAT IS TRUE.

* * *

[RT 581] ROBERT MILLER, CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN [RT 582] FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: MY NAME IS ROBERT MILLER, M-I-L-L-E-R. DIRECT EXAMINATION

BY MR. STONE: Q. MR. MILLER, WHERE ARE YOU EMPLOYED?

A. I AM EMPLOYED BY THE ORANGE COUNTY HEALTH CARE AGENCY, JAIL PSYCHIATRIC TEAM.

Q. AND HOW LONG HAVE YOU BEEN EMPLOYED THERE?

A. SINCE MARCH THE 17TH.

Q. WHAT IS YOUR POSITION THERE?

A. MENTAL HEALTH SPECIALIST.

Q. WHAT EXACTLY IS A MENTAL HEALTH SPECIALIST?

A. I AM A MASTER'S LEVEL TREATMENT PERSON ON THE PSYCHIATRIC TEAM. I WORK WITH PSYCHIATRISTS, CLINICAL PSYCHOLOGISTS, REGISTERED NURSES AND CLINICAL SOCIAL WORKERS IN PROVIDING MENTAL HEALTH SERVICES TO INMATES IN THE JAIL.

* * *

[RT 595] Q. SO THE PRIMARY IS APPROVED AFTER THE CROSS OUT, THIS IS STILL PRIMARY; SCHIZOPHRENIA, PARANOID TYPE, THAT WASN'T CROSSED OUT, RIGHT?

A. RIGHT. IT WASN'T CROSSED OUT, BUT BECAUSE WE WERE ADDING SOMETHING DOWN TOWARD THE BOTTOM, THAT SUPERSEDES WHAT WAS THE ORIGINAL DIAGNOSIS.

SO THE WORKING DIAGNOSIS AT THE TIME THAT HE WAS ADMITTED, WHEN HE WAS FIRST BROUGHT TO OUR ATTENTION, WE FIRST INTERVIEWED HIM, WAS THE SCHIZOPHRENIA, PARANOID TYPE WITH A RULE OUT OF BIPOLAR AND A RULE OUT OF A SCHIZOTYPAL PERSONALITY DISORDER.

BUT THEN OVER THE NEXT THREE WEEKS, WHILE WE HAD THE INDIVIDUAL ON OUR FLOOR AND WE CONTINUED TO OBSERVE AND TALK WITH HIM, OBTAIN OTHER RECORDS AND CONSULT WITH EACH OTHER ON THE TEAM, THOSE OF US WHO SAW HIM, THAT EVOLVED INTO A NEW DIAGNOSIS

AND THE NEW DIAGNOSIS THEN WAS THE V5620 OF MALINGERING ON AXIS ONE AND THE DIAGNOSIS OF 301.70, ANTISOCIAL PERSONALITY DISORDER, ON AXIS TWO.

[RT 596] Q. THIS WAS - PART OF THIS WAS BASED ON - THE CHANGING WAS BASED ON PRIOR RECORDS?

A. BASED ON PRIOR RECORDS AND ALSO BASED UPON OBSERVATION OF HIS BEHAVIOR AND DEMEANOR WHILE HE WAS ON OUR FLOOR FOR THE SUBSEQUENT TWO WEEKS, TWO TO THREE WEEKS.

Q. SO THEN YOU FEEL YOUR FIRST IMPRESSION THEN WAS WRONG?

A. I FEEL THAT THE - AFTER THE INFORMATION THAT I RECEIVED AND THE OBSERVATION, THE INITIAL IMPRESSION WAS INCORRECT. BUT BASED UPON THE INFORMATION THAT I HAD AT THE TIME THAT I MADE THE INITIAL DIAGNOSTIC IMPRESSION, I FELT THAT IT WAS VIABLE.

Q. DO YOU THINK WITHOUT ADDITIONAL INFORMATION FROM PRIOR REPORTS THAT IN THIS SHORT OF TIME YOUR INITIAL IMPRESSION, JUST FROM OBSERVATIONS AND JUST FROM TALKING WITH MR. MEDINA OR EVALUATING HIM, WOULD HAVE CHANGED THIS DRASTIC, IF YOU CAN GIVE ME AN OPINION ON THAT?

A. YES, I DO FEEL IT WOULD HAVE CHANGED BECAUSE BASICALLY THE ONLY INFORMATION THAT I DID GET FROM A PREVIOUS SOURCE WAS

THAT HE HAD INDEED BEEN TREATED AT ARIZONA STATE HOSPITAL APPROXIMATELY IN THE DURATION OF TIME HE HAD STATED AND THAT HE HAD RECEIVED NO MEDICATIONS AND THERE HAD BEEN NO PSYCHIATRIC TREATMENT PER SE AT THAT INSTITUTION. HE HAD BEEN REFERRED FOR EVALUATION AT THAT TIME, AND I RECEIVED THAT BY TELEPHONE RATHER THAN ANY WRITTEN REPORT.

SO BASICALLY THE CHANGE IN THE DIAGNOSTIC [RT 597] IMPRESSION CAME ABOUT BY OBSERVING HIS BEHAVIOR AND HIS DEMEANOR WHILE HE WAS ON THE FLOOR FOR THE ADDITIONAL TIME.

Q. AND FROM THIS PHONE CALL?

A. THE PHONE CALL JUST BASICALLY CONFIRMED SOMETHING HE HAD ALREADY TOLD ME DURING THE MENTAL STATUS EXAM.

Q. WHAT IF YOU WERE TOLD IN THE PHONE CALL HE HAD RECEIVED PSYCHIATRIC EVALUATION AND COUNSELING FOR OVER A YEAR, HE HAD BEEN CLASSIFIED OR DIAGNOSED BY A PSYCHIATRIST, DOCTOR OF MEDICINE, PRACTICED SOMEWHERE AROUND 15 TO 20 YEARS, AS A PARANOID SCHIZOPHRENIC AND HE INDEED HAD RECEIVED MEDICINE, WOULD THAT HAVE MADE YOU FEEL MAYBE YOUR - MAYBE YOUR FIRST IMPRESSION WAS RIGHT ON?

A. IT MAY HAVE REENFORCED THE INITIAL IMPRESSION. IT ALSO MAY HAVE GIVEN ME SOME INFORMATION AS TO HOW TO CODE HIM IN TERMS

OF WHETHER HE HAD BEEN AT SOME POINT IN REMISSION, WAS NOW REEXPERIENCING SYMPTOMS OR WHETHER THIS HAD BEEN AN ISOLATED INCIDENT OR FIRST PSYCHOTIC INCIDENT IN HIS LIFE.

BUT THE REDIAGNOSIS OF MALINGERING WAS PRIMARILY BASED ON HIS CURRENT STATE OF MIND, HIS CURRENT MENTAL STATUS AT THE TIME WE WERE SEEING HIM AND OBSERVING HIM; AND AT THAT POINT WE WERE NOT OBSERVING PSYCHOTIC SYMPTOMATOLOGY AND SO THE FACT THAT HE HAD BEEN PREVIOUSLY DIAGNOSED, HE COULD WELL HAVE BEEN A PARANOID SCHIZOPHRENIC BUT BE IN REMISSION AND CURRENTLY BE MALINGERING IN HIS CURRENT SITUATION.

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[RT 598] DAVID M. PIERCE, CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: DAVID M. PIERCE, P-I-E-R-C-E.

DIRECT EXAMINATION

BY MR. KREBER: Q. WHAT IS YOUR OCCUPATION?

A. I AM A PSYCHOLOGIST.

* * *

[RT 602] Q. AND OF THE FIRST TEST, THE M.M.P.I., WHAT WAS YOUR CONCLUSIONS ON THAT TEST?

A. THE RESULTS WERE SIMILAR TO THE PROFILES OBTAINED FROM INDIVIDUALS WHO SUFFER FROM SCHIZOPHRENIA, PARANOID TYPE AND ALSO FROM INDIVIDUALS WHO TEND TO USE REGRESSION AND DENIAL EXTENSIVELY, REGRESSION BEING A CONCEPT THAT IMPLIES THAT THE INDIVIDUAL IS ABLE TO PLACE UNPLEASANT IMPULSES OR UNPLEASANT EXPERIENCES OUT OF MIND, AND IT IS IN MY VIEW A KIND OF HABIT THAT MANY PEOPLE EMPLOY – WE ALL USE IT SOMETIMES – BUT THAT MANY PEOPLE EMPLOY WHEN THEY HAVE ACTED OR HAVE IMPULSES TO ACT IN WAYS THAT ARE INCONSISTENT WITH THEIR VIEW OF THEMSELVES.

* * *

Q. WAS HE COOPERATIVE WITH YOU, DR. PIERCE?

[RT 603] A. IT WAS MY IMPRESSION THAT – NUMBER ONE, IT WAS MY IMPRESSION HE WAS NOT DELIBERATELY UNCOOPERATIVE. THERE WERE PERIODS OF TIME WHEN HE WAS – APPEARED TO BE INATTENTIVE, WHICH IS TO SAY THAT THERE WERE PERIODS OF TIME WHEN NO MATTER WHAT I DID, HE WAS ATTENDING TO SOMETHING ELSE.

INDIVIDUALS WHO HAVE HALLUCINATIONS SOMETIMES DO THAT, HOWEVER, IT WAS MY

IMPRESSION THAT WHAT HE WAS DOING WAS FOCUSING ON ANOTHER INDIVIDUAL OR ANOTHER STIMULUS IN ANY EVENT THAT WAS WITHIN HIS VIEW AND THAT HE WAS SIMPLY UNAWARE OF WHAT I WAS ASKING AT THE TIME AND IT WAS NECESSARY OFTEN TO REPEAT THE QUESTION.

THAT HAPPENED PERHAPS – PERHAPS ON EACH OCCASION THAT I SAW HIM. THAT MAY BE A MODEST OVERSTATEMENT, BUT SOMETIMES OCCURRED MORE THAN ONCE DURING AN INTERVIEW.

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[RT 606] THE DEFENDANT: YOUR HONOR, SOMEBODY KEEPS TOUCHING MY ASS. (DEFENDANT MADE OTHER UNINTELLIGIBLE COMMENTS.)

THE COURT: MR. MEDINA, WE HAD AN UNDERSTANDING BEFORE THIS TRIAL STARTED THAT YOU TALK THROUGH YOUR COUNSEL. IF YOU WANT TO TELL YOUR COUNSEL SOMETHING, I WILL ALLOW YOU TO DO THAT.

* * *

Q. NOW, AT THE TIME THAT YOU WENT BACK TO SEE MR. MEDINA ON OR ABOUT JUNE 5TH, DID HE RECOGNIZE YOU?

A. NOT INITIALLY. HE APPEARED TO BE GUARDED AND FROM FACIAL EXPRESSIONS SUSPICIOUS OF ME. HE DID FINALLY RECOGNIZE ME, BUT WE HAD TO TALK FOR A FEW MOMENTS.

Q. DID YOU DRAW ANY CONCLUSIONS AS TO THAT TYPE OF MEMORY LOSS OR GUARDEDNESS BY MR. MEDINA?

A. THAT IT WAS ONE MORE INSTANCE OF WHAT APPEARED TO [RT 607] BE IMPAIRED MEMORY. AT THE TIME THAT I WENT TO SEE HIM, I FIRST WENT TO SEE HIM ON JUNE 2ND, AND FINALLY SAW HIM ON JUNE 6TH I BELIEVE IT WAS – NO, JUNE 5TH.

AT THE TIME THAT I WENT TO SEE HIM ON JUNE 2ND, I WAS ADVISED BY THE DEPUTY IN ATTORNEY BONDS THAT MR. MEDINA HAD TORN UP HIS CELL AND WAS IN THE RUBBER ROOM AND TALKING TO HIS MOTHER.

* * *

[RT 608] Q. YOU SAID IMPAIRED MEMORY. DID YOU DISCOVER OTHER AREAS OF IMPAIRED MEMORY WITH MR. MEDINA?

A. THERE WERE MANY INSTANCES WHEN HE INDICATED THAT HE HAD EXPERIENCED IMPAIRMENT IN MEMORY SUBSEQUENT TO INCARCERATION IN ARIZONA STATING THAT, FOR EXAMPLE, HE DID NOT RECALL EVENTS, PARTICULAR EVENTS IN ARIZONA THAT HAD OCCURRED AND ARE IN THE RECORDS AS, FOR EXAMPLE, WHEN HE RAN THROUGH A DINING HALL WITH A WEAPON, A SHANK, AND SWUNG IT AT A NUMBER OF OTHER INMATES BEFORE HE WAS PLACED IN MENTAL RESTRAINTS. HE HAD NO MEMORY OF THAT.

AND THERE WERE OTHER INSTANCES OF WHICH HE DID NOT HAVE MEMORY, NOT ALL OF

THEM INVOLVING VIOLENCE OR ASSAULTIVENESS BUT ALSO INVOLVING OBJECTS.

Q. HOW COULD YOU TELL WHETHER HE, MR. MEDINA, WAS VOLUNTARILY FORGETTING THESE THINGS OR WAS IT BECAUSE OF SOME IMPAIRED MENTAL ILLNESS OR COULD YOU TELL?

A. ONE CANNOT ALWAYS TELL. HOWEVER, THERE WERE INSTANCES IN WHICH HE FAILED TO RECALL THINGS FOR WHICH THERE WAS NO GAIN TO HIM IN ITS BEING FORGOTTEN.

[RT 609] SECONDLY, WITH RESPECT TO THE PRESENT ALLEGED OFFENSE, WE HAD DISCUSSED THE – I HAD RAISED THE ISSUE THAT IT MADE IT VERY DIFFICULT FOR AN ATTORNEY OR FOR ANYONE ELSE WHO MIGHT WISH TO UNDERSTAND EITHER WHAT HAPPENED OR WHETHER IT HAPPENED IF IN FACT HE COULD NOT CONTRIBUTE THAT IN FACT IT WOULD – IT WAS UNFORTUNATE HE COULD NOT REMEMBER IF HE COULD NOT BECAUSE IT MIGHT BE TO HIS ADVANTAGE TO REMEMBER.

AND HIS RESPONSE TO THAT IN EFFECT WAS THAT I CAN'T REMEMBER WHAT I CAN'T REMEMBER.

Q. NOW, FIRST OF ALL IN YOUR ANALYSIS OR CONCLUSIONS, YOU FOUND MR. MEDINA TO BE COMPETENT TO STAND TRIAL?

A. YES, I DID.

Q. AND I TAKE IT I ASSUME YOU KNOW THE COMPETENCY STANDARDS?

A. I BELIEVE I DO.

* * *

[RT 610] Q. IN RECEIVING OTHER HISTORIES, SAY, FROM ARIZONA STATE HOSPITAL, PENITENTIARY OR FORM [sic] THE JAIL, MENTAL SERVICES UNIT, IF YOU GOT ANY OF THEIR REPORTS, COULD YOU MAKE A DETERMINATION WHETHER MR. MEDINA'S MEMORY IS IMPAIRED BY VOLUNTARINESS OR INVOLUNTARINESS?

A. I DON'T RECALL THAT I OBTAINED ANY DATA THAT WOULD INDICATE TO ME THAT HE WAS VOLUNTARILY FORGETTING MURDERS, THAT HE WAS MALINGERING OR WITHHOLDING FROM ME. I HAD NO DATA TO SUPPORT THAT.

THEREFORE, I BELIEVE ONE STARTS WITH AN ASSUMPTION OF A COOPERATIVENESS AND ASKS THE QUESTION THEN IS THERE EVIDENCE FOR VOLUNTARY FORGETTING AND EITHER IN THE RECORD OR AT THE TIME, AND I DID NOT FIND THAT SUBSTANTIALLY.

Q. BUT YOU UNDERSTAND THE MOTIVES OF MALINGERING BEING IN YOUR POSITION IN INTERVIEWING PEOPLE AT THE JAIL, DO YOU NOT?

A. YES.

Q. AND THE MORE SERIOUS THE CHARGES OR FACING A CAPITAL PUNISHMENT, YOU TOOK THAT INTO CONSIDERATION, DID YOU NOT?

A. YES, HOWEVER, IT HAS BEEN MY EXPERIENCE THAT THE [RT 611] SERIOUSNESS OF THE

CHARGES IS NOT NECESSARILY RELATED TO WHETHER OR NOT ONE MALINGERS.

Q. WHY DO YOU DRAW THAT CONCLUSION?

A. SIMPLY EXPERIENCE WITH PEOPLE WHO HAVE DONE RELATIVELY MINOR THINGS AND WHO SOMETIMES CLEVERLY AND SOMETIMES NOT SO CLEVERLY ATTEMPT TO EITHER PLACE THINGS IN A FAVORABLE LIGHT OR DENY AN EVENT OCCURRED.

Q. DID YOU SEE ANY SIGNS OF MR. MEDINA BEING A MALINGERER?

A. I DID NOT. THE QUESTION AROSE FOR ME AS IT USUALLY DOES UNDER SUCH CIRCUMSTANCES MANY TIMES. IT IS THE CASE THAT WHEN AN INDIVIDUAL SAYS HE DOESN'T REMEMBER, THERE IS ALWAYS THE QUESTION ABOUT WHETHER OR NOT THIS IS TRUE AMNESIA OR ATTEMPTED DECEPTION.

FREQUENTLY INDIVIDUALS WHO HAVE EXPERIENCED - HAD A TRAUMATIC EXPERIENCE SOMETIMES, FOR EXAMPLE, IN AN AUTOMOBILE ACCIDENT OR OTHER KIND OF ACCIDENT AND SOMETIMES WHEN THEY HAVE COMMITTED AN ACT SUCH AS KILLING A SPOUSE, THEY WILL IN FACT BE AMNESIC FOR THE EVENT.

USUALLY, HOWEVER, WHEN THE MEMORY IS IMPAIRED, WHEN AMNESIA IS SECONDARY TO PSYCHOLOGICAL FACTORS, THAT IS, WHEN PSYCHOLOGICAL FACTORS CAUSED THEM TO FORGET LIKE THAT, THERE IS OVER TIME A TENDENCY TO RECOVER THE MEMORY, THAT IS, THE PERIOD OF

MEMORY LAPSE SHRINKS IN SIZE AND OFTEN NEVER GETS TO ZERO, THAT IS, THEY MAY REMEMBER BEING IN THE ROOM IN WHICH SOMEONE WAS KILLED AND HAVING A GUN, BUT NEVER RECALL [RT 612] ACTUALLY SHOOTING IT AND SO ON. ONE IS ALWAYS SENSITIVE TO THOSE ISSUES.

Q. BUT IN YOUR INTERVIEWS WITH MR. MEDINA, YOU FOUND THAT HE DID NOT RECALL OR HAVE MEMORY OF INCIDENTS PERTAINING TO THE CHARGES AGAINST HIM IN THIS CASE?

A. THAT IS CORRECT. HE HAD TWO MEMORIES THAT MAY HAVE HAD ANY RELEVANCE AT ALL. HE OFFERED THEM AT DIFFERENT TIMES.

* * *

Q. AND, FOR EXAMPLE, IF AN ATTORNEY WAS TO GO VISIT MR. MEDINA, HE IS FACING CAPITAL OFFENSES ALONG WITH NUMEROUS OTHER CHARGES AND YOU SIT DOWN WITH MR. MEDINA AT AN INTERVIEW FOR 45 MINUTES AND YOU TALK ABOUT THE GREEN WILLY'S JEEP, WHAT DID YOU MAKE OF ALL THAT, DO YOU HAVE ANY OPINION ON IT?

[RT 613] A. I CANNOT SAY CONCLUSIVELY. HOWEVER, IT IS MY OPINION THAT IT IS MORE LIKELY THAN NOT THE CASE THAT HE DOES NOT RECALL.

Q. BUT IF YOU SAY THAT HE IS HAVING PROBLEMS RECALLING THE CIRCUMSTANCES OR THE DAYS SURROUNDING THE SERIOUS CRIMES, HOW IS HE GOING TO MEET THE TEST OF BEING ABLE TO

WORK WITH HIS LAWYERS IF HE IS NOT VOLUNTARILY DOING THIS?

A. AS WITH ANY OTHER KNOWLEDGE OR LACK OF KNOWLEDGE, IMPAIRMENT OR ABSENCE OF IMPAIRMENT, IT IS MY OPINION THAT HE HAS THE CAPACITY TO COOPERATE WITH COUNSEL AND WILL DO SO TO THE EXTENT THAT HE IS ABLE. I CAN'T SAY MORE THAN THAT, I BELIEVE.

* * *

[RT 614] Q. WOULD YOU FIND IT CONSISTENT IN YOUR TEST AND EVALUATION THAT MR. MEDINA SUFFERED FROM SOME DEGREE OF PARANOID SCHIZOPHRENIA?

A. IT IS CONSISTENT WITH THE HISTORY AND THE RESULTS OF THE EXAMINATION THAT HE SUFFERS FROM SCHIZOPHRENIA, PARANOID TYPE.

* * *

[RT 619] Q. NOW, YOU MENTIONED THAT I BELIEVE YOU COULD CONCLUDE THAT HE IS SCHIZOPHRENIC BUT HE COULD STILL BE THAT WAY AND STILL BE COMPETENT UNDER YOUR EVALUATION?

A. YES.

Q. WHY IS THAT?

A. IT IS BECAUSE – NUMBER ONE, MOST INDIVIDUALS WHO SUFFER FORM [sic] SCHIZOPHRENIA ARE – WOULD BE COMPETENT IF THEY WERE TO BE CHARGED WITH SOMETHING, BECAUSE THE CRITERIA FOR COMPETENCY IS THAT AN INDIVIDUAL

MUST HAVE THE CAPACITY TO UNDERSTAND THE NATURE OF THE PROCEEDINGS TAKEN AGAINST THEM, TO UNDERSTAND WHAT IS GOING ON, TO UNDERSTAND THE CHARGES AGAINST THEM ON THE ONE HAND AND ON THE ANOTHER [sic] HAND THE CAPACITY TO COOPERATE WITH COUNSEL IN A RATIONAL DEFENSE. AND [RT 620] IT IS MY OPINION THAT HE HAS THAT CAPACITY IN SPITE OF THE FACT HE HAS A MENTAL DISORDER.

I WOULD ESTIMATE THAT IN MY EXPERIENCE SOMETHING FEWER – WELL UNDER FIVE PERCENT OF INDIVIDUALS WHO SUFFER FROM MENTAL DISORDERS ARE NOT COMPETENT TO STAND TRIAL.

Q. THAT WOULD BE YOUR EVALUATION THEN IN ADDITION TO THE FACT THAT HE SUFFERS FROM THE MENTAL IMPAIRMENTS AND DISORDERS THAT YOU HAVE DESCRIBED?

A. YES.

* * *

[RT 628] Q. DID YOU DISCOVER ANY TYPE OF PSYCHOSIS WITH MR. MEDINA?

A. YES.

Q. AND WHAT IS A PSYCHOSIS, UNDER YOUR TERMINOLOGY?

A. THE TERMINOLOGY – THE TERM HAS MEANT DIFFERENT THINGS AT DIFFERENT TIMES IN THE MENTAL HEALTH PROFESSIONS.

CURRENTLY, IN THE DIAGNOSTIC STATISTICAL MANUAL THIRD REVISION IT MEANS A MENTAL

STATE IN WHICH THE INDIVIDUAL LOSES CONTACT WITH REALITY, USUALLY INFERRED FROM THE PRESENCE OF HALLUCINATIONS OR DELUSIONS.

[RT 629] Q. AND YOU DID INDICATE THAT MR. MEDINA DID HAVE HALLUCINATION [sic]. COULD YOU DESCRIBE WHAT YOU FOUND IN THAT AREA CONCERNING MR. MEDINA?

A. WELL, HE REPORTED HAVING HAD THE HALLUCINATION OF JESUS CHRIST, OF ST. JOHN. THOSE ARE VISUAL HALLUCINATIONS.

HE HAD REPORTED THE PRESENCE OF AUDITORY HALLUCINATIONS ON MORE THAN ONE INSTANCE, ONE OF THEM PREVIOUSLY REFERRED TO WAS A VOICE FROM THE BED OF FLOORBOARDS APPROXIMATELY TEN YEARS AGO.

ANOTHER ONE WAS AN INSTANCE FROM WHICH I DO NOT HAVE A DATE, BUT WAS THE VOICE OF HIS NOW DEAD BROTHER, WHO WAS DEAD AT THE TIME HE HEARD THE VOICE, I BELIEVE.

THAT IS THE KIND OF THINGS THAT IS REFERRED TO AS A HALLUCINATION.

Q. NOW, THESE HALLUCINATIONS ARE NOT VERIFIABLE, YOU CAN NOT CORROBORATE THEM IN ANY WAY; YOU ARE GETTING THE SOURCE, IN THIS CASE, FROM MR. MEDINA?

A. THAT IS CORRECT.

Q. AND WHAT DELUSIONS FROM MR. MEDINA? WHAT DID YOU FIND IN THAT AREA?

A. HE HAS HAD – REPORTEDLY HAS HAD DELUSIONS, AS FOR EXAMPLE, AFTER HE HAD GOTTEN OUT OF ARIZONA PRISON AND WAS RESIDING AT HIS SISTER'S IN LAKE ELSINORE, HE FREQUENTLY REPORTED THAT THE NEIGHBORS WERE AGAINST HIM, THAT HE HAD HEARD THE NAME ROCOO, A NAME WHICH HE HAD USED IN ARIZONA, FRANK ROCCO. [RT 630] AND HAVING HEARD THAT NAME, HE INFERRED THAT THE PEOPLE IN ARIZONA, PEOPLE UNSPECIFIED AND UNKNOWN TO HIM, HAD NOTIFIED THE NEIGHBORS THAT THAT HAD BEEN HIS NAME AND HAD BRIEFED THEM ON THE FACTS WITH RESPECT TO HIS IMPRISONMENT IN ARIZONA. THAT'S ONE EXAMPLE OF A DELUSION.

* * *

Q. OKAY. WHAT DID THE MMPI TEST GIVE TO YOU WITH RESPECT TO YOUR OPINIONS OF THE DEFENDANT?

A. A COUPLE OF THINGS. ONE OF THEM, IT CORROBORATED THE IMPRESSIONS DERIVED BOTH FROM HIS REPORT TO ME AND FROM THE HISTORY THAT HE HAS THE CHARACTERISTICS OF AN INDIVIDUAL WITH SCHIZOPHRENIC PARANOID TYPE.

IN ADDITION TO WHICH HE HAS A STRONG, MUCH STRONGER THAN USUAL, TENDENCY TO PUT OUT OF MIND THOSE THINGS THAT ARE THREATENING TO HIM, TO USE REPRESSION, IN OTHER WORDS, THE TERM THAT I DESCRIBED THIS MORNING.

SO IT TENDED TO BE CONSISTENT WITH OTHER SOURCES OF INFORMATION.

* * *

[RT 639] Q. YOU PRODUCED A REPORT PURSUANT TO YOUR EARLIER AGREEMENT WITH MR. KREBER'S OFFICE, I GUESS?

A. YES.

Q. AND THE ESSENCE OF THAT REPORT IS THAT ON JANUARY 20TH, 1986 YOUR OPINION WAS THAT MR. MEDINA WAS COMPETENT TO STAND TRIAL?

A. THAT IS CORRECT.

Q. SO YOUR OPINION NOW IS CONSISTENT WITH YOUR OPINION BACK IN JANUARY OF 1986?

A. YES IT IS.

* * *

[RT 640] BY MR. BROWN: Q. WHAT WAS YOUR OPINION AT THAT TIME [RT 641] WITH RESPECT TO WHETHER OR NOT THE DEFENDANT UNDERSTOOD THE NATURE OF THE CHARGES?

A. IT WAS MY OPINION THAT HE DID.

Q. AND DID THE DEFENDANT AT THAT TIME UNDERSTAND THE IMPLICATIONS FOR HIM IF HE WAS FOUND GUILTY?

A. YES.

Q. DID HE UNDERSTAND THE COURTROOM PROCEDURE?

A. YES.

Q. WHAT WAS THE DEFENDANT'S UNDERSTANDING OF THE COURTROOM PROCEEDINGS AT THAT TIME?

A. NOW, I HAVE TO REFER TO MY REPORT OR MY NOTES.

Q. THAT'S WHAT I WAS HOPING.

A. THE ROLE OF THE JURY IS TO DETERMINE, QUOTE, "WHETHER OR NOT ONE IS LYING OR MAKING UP A STORY OR TELLING THE TRUTH," UNQUOTE.

Q. QUOTE "IN A JURY TRIAL THE ROLE OF THE JURY IS TO DETERMINE WHETHER OR NOT THE PARTY IS GUILTY OR NOT. THE ROLE OF THE JUDGE IS TO DO WHAT HE THINKS IS RIGHT UNDER HIS DISCRETION AT THE TIME AND TO DECIDE WHAT TO DO IF FOUND GUILTY. THE ROLE OF THE DISTRICT ATTORNEY IS TO FIND YOU GUILTY AND TO 'SCREW YOU' AND TO KNOW EVERYTHING HE CAN ABOUT YOU FROM ORAL OR WRITTEN REPORTS."

Q. LET'S SEE NOW, HE PUT "SCREW YOU" IN QUOTES, TOO, NOW, DIDN'T HE?

A. I PUT THAT IN QUOTES.

Q. WERE THOSE HIS EXACT WORDS?

[642] A. THOSE WERE HIS WORDS.

Q. RIGHT. HE'S GOT A PRETTY GOOD UNDERSTANDING OF WHAT'S GOING ON, DOESN'T HE?

A. HE DID ON JANUARY WHATEVER, 20TH, 1986.

Q. WHAT WAS HIS CONCEPT OF THE ROLE OF THE DEFENSE ATTORNEY?

A. "TO DEFEND THE CLIENT, NOT TO JUDGE, HIS JOB REALLY SHOULD BE TO DEFEND UNTIL PROVEN GUILTY, NOT TO USE HIS OWN DISCRETION."

Q. OKAY. AND THAT'S BASICALLY HIS IDEA AND HIS CONCEPT OF WHAT'S GOING ON RIGHT NOW; ISN'T THAT TRUE?

A. THAT'S THE WAY HE PHRASED IT AT THAT TIME, YES.

Q. AND THEN IN YOUR JUNE 10TH REPORT, 1986, YOU SAY ABOUT THE SAME THING; ISN'T THAT CORRECT?

A. YES, I DO.

* * *

[RT 656] RICHARD NEGRETE, CALLED AS A WITNESS BY THE PEOPLE, OUT OF ORDER, WAS SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU STATE YOUR FULL NAME, AND SPELL YOU LAST [sic] NAME FOR THE COURT, PLEASE?

THE WITNESS: MY NAME IS RICHARD NEGRETE, N-E-G-R-E-T-E.

DIRECT EXAMINATION

BY MR. BROWN: Q. MR. NEGRETE, WHAT IS YOUR OCCUPATION?

A. I'M A PAROLE AGENT WITH THE STATE OF CALIFORNIA ASSIGNED TO THE RIVERSIDE UNIT.

* * *

Q. DURING THE MONTH OF AUGUST, 1984, DID YOU HAVE OCCASION TO COME IN CONTACT WITH THE DEFENDANT MR. MEDINA, AT THE FAR END OF THE TABLE OVER HERE?

A. YES, I DID.

* * *

[RT 657] Q. WHAT WAS THE SUBSTANCE OF THE CONVERSATION THAT YOU HAD WITH MR. MEDINA AT THAT TIME?

A. WE DISCUSSED HIS CONDITIONS OF PAROLE. WE TALKED ABOUT POSSIBLE SPECIAL CONDITIONS THAT MAY BE ADDED. WE DIDN'T HAVE ALL THE INFORMATION OF HIS FILE AT THE TIME.

I ALSO INSTRUCTED HIM THAT HE WAS TO REGISTER WITH THE LOCAL AUTHORITIES, AS PER 290 P.C. OF THE PENAL CODE.

Q. WOULD YOU TELL THE FOLKS ON THE JURY HERE WHAT 290 P.C. IS?

A. IT'S PENAL CODE SECTION REFERRING TO – REQUIRING INDIVIDUALS THAT HAVE PRIOR SEXUAL CONVICTIONS TO REGISTER WITH THE LOCAL AUTHORITIES.

Q. DID YOU HAVE OCCASION TO AGAIN CONTACT MR. MEDINA ON SEPTEMBER 13TH, 1984?

A. YES, I DID. THIS WAS BY TELEPHONE.

Q. AND WHAT WAS THE SUBSTANCE OF YOUR CONVERSATION WITH MR. MEDINA ON SEPTEMBER 13TH, 1984?

[RT 658] A. HE INFORMED ME THAT HE HAD REGISTERED WITH THE LAKE ELSINORE SHERIFF'S OFFICE. AND HE ALSO ADVISED ME THAT HE HAD PURCHASED AN AUTOMOBILE AND GAVE ME THE – HIS LICENSE – HIS DRIVER'S LICENSE NUMBER.

Q. DID HE GET A DRIVER'S LICENSE? DID HE OBTAIN A DRIVER'S LICENSE?

A. YES, HE DID.

Q. SO THAT WOULD HAVE MEANT HE WOULD HAVE HAD TO GO TO THE DEPARTMENT OF MOTOR VEHICLES TO GET A DRIVER'S LICENSE?

A. THAT'S WHAT I UNDERSTAND, YES.

Q. DID YOU LATER CONFIRM WHETHER OR NOT THE DEFENDANT HAD REGISTERED AS A SEX OFFENDER WITH THE LAKE ELSINORE POLICE DEPARTMENT?

A. YES.

* * *

Q. FOR INSTANCE, WHEN YOU ADVISED MR. MEDINA OF THE CONDITIONS AND RESTRICTIONS OF PAROLE, DID YOU FORM AN OPINION AS TO WHETHER MR. MEDINA UNDERSTOOD THOSE?

A. YES, I DID. I WAS SURE THAT HE UNDERSTOOD.

* * *

[RT 665] BY MR. BROWN: Q. DID MR. MEDINA EVER ACT BIZARRE, WHEN YOU SAW HIM?

A. NO, SIR.

* * *

[RT 677] J. D. GREEN, JR., CALLED AS A WITNESS BY THE PEOPLE, OUT OF ORDER, WAS SWORN, EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: WOULD YOU STATE YOUR FULL NAME AND SPELL YOUR LAST FOR THE COURT, PLEASE?

THE WITNESS: J. D. GREEN, JR., G-R-E-E-N.

DIRECT EXAMINATION

BY MR. BROWN: Q. IS IT SERGEANT GREEN?

A. YES.

Q. SERGEANT GREEN, WHAT IS YOUR OCCUPATION?

A. I'M A DEPUTY SHERIFF FOR THE COUNTY OF ORANGE.

* * *

HE WROTE ME AN INMATE MESSAGE SLIP ON JANUARY THE 22D, 1985, REQUESTING A TRANSFER OUT OF THE ADMINISTRATIVE SEGREGATION AREA, BECAUSE OF A COUPLE OF INCIDENTS THAT OCCURRED. AND HE SAID THAT HE HAD BEEN FEELING A LITTLE PARANOID.

I BROUGHT HIM DOWN ON JANUARY 23RD, FOR CLASSIFICATION, AND SPOKE WITH HIM. AND FEELING THAT HE HAD A LEGITIMATE CONCERN ABOUT HIS SAFETY AND LIFE IN THE ADMINISTRATIVE SEGREGATION AREA, I ORDERED HIM TRANSFERRED TO OUR PROTECTIVE CUSTODY AREA, WHICH IS MODULE "D," TANK 19.

Q. OKAY. NOW, YOU'VE INDICATED THAT YOU RECEIVED HIS COMPLAINT ON, I THINK YOU SAID JANUARY 22D, 1985, DID YOU MEAN 1986? MAYBE I JUST MAY HAVE MISHEARD YOU.

A. YES. IT WAS 1986. I'M SORRY.

Q. AND THEN HE CAME DOWN TO YOUR OFFICE ON JANUARY 23RD, 1986?

A. THAT'S CORRECT.

Q. DID YOU HAVE A CONVERSATION WITH MR. MEDINA AT THAT TIME?

[RT 681] A. YES, I DID.

Q. DO YOU RECALL HOW LONG THAT CONVERSATION LASTED?

A. PROBABLY 20 MINUTES TO A HALF HOUR.

Q. DID YOU HAVE A RATIONAL CONVERSATION WITH HIM?

A. YES.

Q. WAS THAT AT A TIME WHEN MR. MEDINA WANTED YOU TO DO SOMETHING FOR HIM?

A. YES.

Q. HE WANTED YOU TO CHANGE HIS HOUSING; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. WAS HE RESPONSIVE TO ANY QUESTIONS YOU HAD TO ASK HIM?

A. YES.

* * *

[RT 687] BY MR. BROWN: Q. HAVE YOU FORMED AN OPINION AS TO WHETHER OR NOT MR. MEDINA HAS UNDERSTOOD YOU, WHEN YOU HAVE COMMUNICATED WITH HIM BETWEEN TODAY'S DATE AND NOVEMBER 8TH, 1984?

A. YES.

Q. WHAT OPINION DO YOU HAVE IN THAT RESPECT?

* * *

THE WITNESS: I HAVE HAD NO QUESTION AT ALL AS TO WHETHER OR NOT I'VE BEEN ABLE TO COMMUNICATE WITH MR. MEDINA. I FELT THAT HE

HAS UNDERSTOOD EVERYTHING THAT WE DISCUSSED. MY ONLY PERSONAL CONTACT WITH HIM WAS AT HIS REQUEST.

AND WE SAT IN THE CLASSIFICATION OFFICE AND SPOKE FOR SOME TIME. HE WAS VERY RESPONSIVE. HE LAID OUT, TO ME, VERY VALID REASONS FOR WANTING THIS CHANGE.

HE WAS VERY DESCRIPTIVE IN TELLING ME THAT THE - HE WAS IN THE SHOWER AND HAD COME OUT OF THE SHOWER WITH NOTHING BUT A TOWEL WHEN HE WAS ATTACKED. AND HE HAD NO WAY TO DEFEND HIMSELF. HE EXPLAINED TO ME WHAT HE TRIED TO DO TO GET AWAY FROM THE ATTACKER.

HE SAID THAT HE HAD GONE, THEN, TO THE HOSPITAL. WHEN HE WAS RETURNED AND CLEARED FOR GENERAL HOUSING AGAIN, [RT 688] AND WAS RETURNED TO ADMINISTRATIVE SEGREGATION, HE SAID HE WAS FINE FOR A WHILE AND THEN HE JUST STARTED BECOMING MORE AND MORE PARANOID, ESPECIALLY IN LIGHT OF THE FACT THAT THERE HAD BEEN AT LEAST ONE, AND I'M THINKING TWO, STABBINGS IN THE MEANTIME IN THERE INVOLVING OTHER INMATES.

AND HE SAID, "I JUST FEEL THAT I HAVE TO HAVE SOME KIND OF PROTECTION AND BE MOVED OUT OF THERE."

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[RT 694] SANTA ANA, CALIFORNIA - MONDAY, JULY 21, 1986

MORNING SESSION

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[RT 728] REDIRECT EXAMINATION [DR. SAKURAI]

BY MR. KREBER: Q. DOCTOR, YOU'RE THE HEAD OF THE UNIT IN THE RESPECTIVE DEPARTMENT THAT YOU WORK IN AT THE ORANGE COUNTY SHERIFF'S DEPARTMENT, ARE YOU NOT?

A. YES, I AM.

Q. NOW, MR. MEDINA'S BEEN IN ORANGE COUNTY FACILITY SINCE THE LATTER PART OF - -

(INTERRUPTION IN PROCEEDINGS.)

THE COURT: ALL RIGHT. LADIES AND GENTLEMEN OF THEJURY, YOU MAY BE EXCUSED TO THE JURY ROOM.

(RECESS TAKEN)

(THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS:)

THE COURT: ALL RIGHT. WE'RE IN CHAMBERS ON PEOPLE VERSUS MEDINA, COUNSEL ARE PRESENT AND THE DEFENDANT HAS WAIVED HIS APPEARANCE.

FOR THE RECORD, I'M GOING TO TRY AND DESCRIBE WHAT HAPPENED OUT IN OPEN COURT BEFORE WE HAD TO TAKE THE [RT 729] RECESS. AND IF ANYBODY HAS ANY ADDITIONAL INFORMATION THAT THEY SAW THAT I DIDN'T SEE, WHY PLEASE FEEL FREE TO PUT IT ON THE RECORD.

FROM MY VANTAGE POINT, I HEARD A LOUD TYPE OF CRY OR NOISE FROM MR. MEDINA, AND HE STOOD UP AND PUT HIS HANDS UNDER AND JUST DUMPED THE COUNSEL TABLE OVER IN A FORWARD MANNER, SCATTERING EVERYTHING OFF THE TABLE, AT WHICH POINT THE MARSHALS SUBDUED HIM.

NOW, THAT'S ALL I SAW. THEN I DIRECTED THE JURY BACK TO THE JURY ROOM AND LEFT THE BENCH.

NOW, DID ANYBODY ELSE SEE ANYTHING ELSE THAT THEY'D LIKE TO DESCRIBE FOR THE RECORD?

* * *

[RT 753] DAVID SANDBERG, CALLED AS A WITNESS ON BEHALF OF THE DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: PLEASE STATE YOUR FULL NAME FOR THE RECORD AND SPELL YOUR LAST.

THE WITNESS: DAVID SANDBERG, S-A-N-D-B-E-R-G.

[RT 754] DIRECT EXAMINATION

BY MR. KREBER: Q. WHAT IS YOUR OCCUPATION?

A. PRIVATE INVESTIGATOR.

Q. DO YOU KNOW THE PERSON I AM STANDING BEHIND?

A. YES, I DO.

Q. LET THE RECORD REFLECT I AM STANDING BEHIND MR. MEDINA.

HOW LONG HAVE YOU KNOWN MR. MEDINA?

A. SINCE APPROXIMATELY DECEMBER OF '85.

Q. '84?

A. YES, AS SOON AS WE WERE ON THE CASE.

Q. AND YOU WERE APPOINTED, WERE YOU NOT, TO BE THE PRIVATE INVESTIGATOR ON MR. MEDINA'S CASE?

A. YES.

Q. AND DURING THIS TIME PERIOD, SINCE YOU HAVE BEEN APPOINTED, HAVE YOU SEEN MR. MEDINA AT THE ORANGE COUNTY JAIL?

A. YES, I HAVE.

Q. AND APPROXIMATELY HOW MANY TIMES HAVE YOU VISITED MR. MEDINA?

A. I WOULD SAY OVER 20 TIMES.

Q. AND DURING THE TIMES THAT YOU WOULD SEE MR. MEDINA, WHAT WAS THE PURPOSE IN VISITING HIM?

A. TO ATTEMPT TO HAVE HIM ASSIST ME IN DOING AN INVESTIGATION ON HIS BEHALF.

Q. DURING THE TIME YOU VISITED MR. MEDINA AT THE ORANGE COUNTY JAIL, DID YOU EVER HAVE A RELEVANT CONVERSATION [RT 755] WITH HIM CONCERNING THE CHARGES?

A. NO, NOT THAT I CAN RECALL.

Q. DURING THE TIME YOU WOULD VISIT HIM, WHAT WOULD YOU BE – WHAT WOULD THE PURPOSE BE IN SEEING MR. MEDINA?

A. MY PURPOSE AS AN INVESTIGATOR IS TO TRY AND GATHER SOME FACTS THAT WOULD SUBSTANTIATE ANY CLAIMS THAT THE DEFENDANT MAY HAVE HAD AS TO HIS – PERHAPS HIS WHEREABOUTS ON THE DAYS IN QUESTION, AND I WOULD GO THERE TRYING TO INTERVIEW THE DEFENDANT TO FIND OUT IF HE CAN GIVE ME ANY INFORMATION AND ASSIST ME IN MY JOB.

Q. WHAT TYPE OF TOPICS OF CONVERSATION WOULD BE BROUGHT UP BY MR. MEDINA?

A. THE MAJORITY OF THE TIME WE WOULD BE DISCUSSING SOME OF HIS NEEDS WHILE HE WAS INCARCERATED, FROM TOENAIL CLIPPERS TO BOOKS, THE CONDITION OF HIS HAIR OR HIS BEARD, WHETHER TO SHAVE OR NOT TO SHAVE, SOMETIMES TALKS WOULD DEAL WITH RELIGION. THEY WOULD VARY QUITE –

Q. BUT NEVER ON THE CHARGES?

A. NO.

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[RT 804] SANTA ANA, CALIFORNIA – TUESDAY, JULY 22, 1986

MORNING SESSION

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[RT 829] [ARGUMENT BY MR. BROWN:]

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SO, THE QUESTION IS, HAS THE DEFENSE PROVEN THAT THIS DEFENDANT IS MENTALLY INCOMPETENT TO STAND TRIAL. IT'S THE DEFENSE BURDEN.

[RT 830] IT'S NOT LIKE THE REGULAR CRIMINAL CASE THAT YOU HAVE WHERE WE HAVE THE BURDEN OF PROVING SOMEONE GUILTY BEYOND A REASONABLE DOUBT. WE DON'T HAVE THAT BURDEN HERE.

IT'S THE DEFENSE BURDEN. THE LAW PUT THAT BURDEN ON THE DEFENDANT BECAUSE OTHERWISE YOU WOULD HAVE EVERY DEFENDANT SAYING – WHEN IT'S A TOUGH CASE AGAINST HIM, EVERY DEFENDANT WOULD BE COMING IN AND SAYING, I CAN'T COOPERATE WITH MY ATTORNEY, I CAN'T UNDERSTAND THE CHARGES. AND YOU WOULDN'T HAVE ANY TRIALS OCCURRING.

SO THE LAW HAS MADE IT TOUGH ON THE DEFENDANT TO TRY TO PROVE THAT. AND BASICALLY, I WOULD SUGGEST TO YOU THAT A PERSON HAS TO ALMOST BE A VEGETABLE BEFORE WE SHOULDN'T TRY HIM. AND WE'LL GO INTO WHY I'M SAYING THAT TO YOU IN JUST A SECOND.

THE QUESTION REALLY, THEN, IS, IS THIS DEFENDANT CAPABLE OF UNDERSTANDING AND

COOPERATING OR IS HE INCAPABLE OR IS HE MALINGERING AND JUST AN ANTISOCIAL PERSONALITY OR A MANIPULATOR. THOSE ARE BASICALLY THE ISSUES.

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[RT 901] [INSTRUCTIONS TO THE JURY]

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THE COURT: IN THIS PROCEEDING YOU ARE TO DECIDE WHETHER OR NOT THE DEFENDANT IS MENTALLY COMPETENT TO BE TRIED FOR A CRIMINAL OFFENSE.

THIS PROCEEDING IS NOT IN ANY SENSE A CRIMINAL PROCEEDING. AND THE INNOCENCE OR GUILT OF THE DEFENDANT OF [RT 902] THE CRIMINAL CHARGE AGAINST HIM IS NOT INVOLVED, NOR IS THE QUESTION OF HIS LEGAL INSANITY AT THE TIME OF THE COMMISSION OF THE OFFENSE INVOLVED.

ALTHOUGH IN SOME SUBJECTS HIS MIND MAY BE DERANGED OR UNSOUND, A PERSON CHARGED WITH A CRIMINAL OFFENSE IS DEEMED MENTALLY COMPETENT TO BE TRIED FOR THE CRIME CHARGED AGAINST HIM:

ONE, IF HE IS CAPABLE OF UNDERSTANDING THE NATURE AND PURPOSE OF THE PROCEEDINGS AGAINST HIM.

TWO, IF HE COMPREHENDS HIS OWN STATUS AND CONDITION IN REFERENCE TO SUCH PROCEEDINGS.

AND, THREE, IF HE IS ABLE TO ASSIST HIS ATTORNEY IN CONDUCTING HIS DEFENSE IN A RATIONAL MANNER.

THE DEFENDANT IS PRESUMED TO BE MENTALLY COMPETENT AND HE HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE IS MENTALLY INCOMPETENT AS A RESULT OF MENTAL DISORDER OR DEVELOPMENTAL DISABILITY.

PREPONDERANCE OF THE EVIDENCE MEANS SUCH EVIDENCE AS, WHEN WEIGHED WITH THAT OPPOSED TO IT, HAS MORE CONVINCING FORCE AND THE GREATER PROBABILITY OF TRUTH.

* * *

[RT 908] SANTA ANA, CALIFORNIA, TUESDAY, JULY 22, 1986

AFTERNOON SESSION

* * *

[RT 911] (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT IN THE PRESENCE OF THE JURY:)

THE COURT: ON PEOPLE VERSUS MEDINA, ALL THE JURORS ARE PRESENT, COUNSEL AND DEFENDANT ARE PRESENT. MR. FAULKNER, I UNDERSTAND THE JURY HAS ARRIVED AT A VERDICT.

JUROR FAULKNER: YES, SIR.

THE COURT: WILL YOU HAND THE VERDICT FORM TO THE BAILIFF, PLEASE.

MADAM CLERK, WILL YOU READ THE VERDICT.

THE CLERK: "IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE, THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VERSUS TEOFILO MEDINA DEFENDANT. NUMBER C56201, VERDICT:

"WE THE JURY IN THE ABOVE-ENTITLED ACTION FIND THE DEFENDANT COMPETENT TO STAND TRIAL.

"DATED 7-22-86, RONALD FAULKNER, FOREMAN."

SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v.
TEOFILO MEDINA, JR., Defendant and Appellant.

[No. S004758. Nov. 19, 1990.]

OPINION

LUCAS, C.J. – Defendant Teofilo Medina, Jr., appeals from a judgment imposing the death penalty following his conviction of three counts of first degree murder (Pen. Code, § 187; all further statutory references are to this code unless otherwise indicated), accompanied by three special circumstance findings, namely, robbery-murder (§ 190.2, subd. (a)(17)(i)), burglary-murder (*id.*, subd. (a)(17)(vii)), and multiple murder (*id.*, subd. (a)(3)). Additionally, defendant was convicted of several counts of robbery (§ 211), second degree burglary (§ 459), false imprisonment (§ 236), assault with a deadly weapon (§ 245, subd. (a)(2)), and possession of a firearm by an ex-felon (§§ 12021, 12021.1).

The jury found that the three murders were premeditated and deliberate, and that defendant was sane at the time of the offenses. The jury returned a verdict of death, and the trial court denied defendant's motion to modify the sentence (§ 190.4, subd. (e)). The court imposed the death penalty for the three murders, and a determinate nineteen-year, four-month sentence for the other offenses. Defendant's appeal is automatic. (§ 1239, subd. (b).) Subsequent to the filing of this appeal, defendant filed a habeas corpus petition which we denied without issuing an order to show cause.

I. Facts

A. *The Offenses*

From October 13 to November 7, 1984, defendant engaged in a crime spree, stealing a gun from a pawnshop, holding up two gas stations, a drive-in dairy, and a market, killing three employees of these establishments (Horacio Ariza, Douglas Metal and Victor Rea), attempting to rob a fourth employee (Moon Yoon), and shooting at two citizens (Cynthia Police and Daniel Barrow) who attempted to follow his getaway car.

Defendant was apprehended after police traced his car to his residence. Police found a gun in defendant's home that, according to prosecution experts, was used to fire the bullets found in the three murder victims. Although other family members lived with defendant, the testimony of his two sisters indicated the gun belonged to him.

Defendant challenged some of the circumstantial evidence linking him to the crimes, but (other than asserting an insanity defense he neither denied his guilt nor offered any alibi defense.

B. *Competency Phase*

Prior to trial, defendant moved for a competency hearing (§ 1368), claiming his present inability to cooperate with counsel. At the hearing, in addition to lay witnesses, various psychiatrists and other experts testified about defendant's possible paranoid schizophrenia, his violent and aberrant behavior, his attempted suicide, and his inability to cooperate with counsel.

Dr. Gold, a psychiatrist who knew defendant while he was in the Arizona prison system, testified that defendant was a paranoid schizophrenic and was incompetent to assist his attorney at trial. Dr. Echeandia, a clinical psychologist at the Orange County jail, doubted the accuracy of the schizophrenia diagnosis, and could not express an opinion on defendant's competence to stand trial. Dr. Sharma, a psychiatrist, likewise expressed doubts regarding the schizophrenia diagnosis and leaned toward a finding of competence. Dr. Pierce, a psychologist, believed defendant was schizophrenic, with impaired memory and hallucinations, but nevertheless was competent to stand trial. Dr. Sakurai, a jail psychiatrist, opined that although defendant suffered from depression, he was competent, and that he may have been malingering. Dr. Sheffield, who treated defendant for knife wounds he incurred in jail, could give no opinion on the competency issue.

At the conclusion of the competency hearing, the jury found defendant competent to stand trial.

C. *Sanity Phase*

At the sanity phase, Dr. Gold stated his opinion that defendant was a paranoid schizophrenic who was not guilty of the charged offenses by reason of insanity. Dr. Pierce concluded that although he believed defendant suffered from paranoid schizophrenia, he lacked data from which he might deduce defendant was insane when the offenses occurred. Dr. Sharma agreed that, whether or not defendant was schizophrenic, there was insufficient evidence suggesting he was insane during the offenses.

Finally, Dr. Klatte, a psychiatrist, found no evidence of any mental disturbance that might have precluded defendant from knowing the nature of his acts or their wrongfulness.

Defendant took the stand during the sanity phase and testified (along with other lay witnesses) about his background, including his prior offenses and convictions, prison terms, drug use, violent and aberrant behavior, attempted suicide, confinement in a state mental hospital, and attempted escape therefrom. According to defendant, he could not recall shooting the victims, although he remembered being chased by Cynthia Police and shooting over her head.

The jury found defendant was legally sane at the time of the offenses.

D. *Penalty Phase*

The prosecution introduced evidence of defendant's prior violent acts, including his murder of another gas station attendant (Martin) during a robbery, assault on a man (Sanchez) in a bar, assault on a prison inmate (Hillyer), and rape (Whitacre). The defense relied on mitigating testimony from Drs. Pierce, Sharma, Sakurai, and Klatte regarding defendant's mental impairment, personality disorder and low intelligence. Defendant's father testified regarding defendant's childhood injury, glue sniffing, and unusual behavior (on one occasion, defendant attempted to pull out his own eyelashes).

II. COMPETENCY PHASE CONTENTIONS

A. *Validity of Section 1369 Subdivision (f)*

Defendant first contends that section 1369, by placing the burden on him to prove his incompetence to stand trial, is unconstitutional as a denial of due process and equal protection under the state and federal Constitutions. (In fact, none of defendant's authorities involves or discusses equal protection concerns, and he makes no separate argument on the point. Accordingly, we conclude that his argument is essentially a due process challenge to the statutory burden allocation.)

Section 1369, subdivision (f), provides in pertinent part that "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous." The jury was instructed in accordance with this provision. (CALJIC No. 4.10.)

Before addressing defendant's challenge, we set forth the relevant legal principles. Section 1368, subdivision (a), provides that if "a doubt arises in the mind of the judge as to the mental competence of the defendant," the court shall require of defense counsel regarding the defendant's competence and, if counsel believes defendant may be incompetent, the court shall order a hearing on the matter. The section further provides that even if defense counsel believes his client is competent, the court may in its discretion, order a competency hearing. (§ 1368, subd. (b).) Once the hearing is ordered, "all

proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." (*Id.*, subd. (c).)

It has long been established that the conviction of an accused while he is legally incompetent violates due process. (*Pate v. Robinson* (1966) 383 U.S. 375, 385 [15 L.Ed.2d 815,822, 86 S.Ct. 836].) Indeed, the United States Supreme Court has held that the failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives him of his due process right to a fair trial and requires reversal of his conviction. (*Ibid.*; see *Drope v. Missouri* (1975) 420 U.S. 162, 171 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896].) Our decisions hold that a competency hearing is required whenever substantial evidence of the accused's incompetence has been introduced. (*People v. Hale* (1988) 44 Cal.3d 531, 538-539 [244 Cal.Rptr. 114, 749 P.2d 769]; *People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92 [184 Cal.Rptr. 611, 648 P.2d 578]; *People v. Laudermilk* (1967) 67 Cal.2d 272, 283 [61 Cal.Rptr. 644, 431 P.2d 228].)

Defendant argues that because fitness to stand trial is fundamental to an adversary system of *justice* (*Drope v. Missouri, supra*, 420 U.S. 162, 171-172 [43 L.Ed.2d 103, 112-113]), due process dictates that once the defendant has raised a bona fide doubt as to his competence, the state must carry the burden of proving him competent. Accordingly, defendant argues, section 1369 and its contrary allocation of the proof burden should be declared unconstitutional.

The validity of section 1369, its presumption of competence and burden of proof allocation, apparently has

never been discussed in a published opinion. (Cf. *People v. Bye* (1981) 116 Cal.App.3d 569, 573-578 [172 Cal.Rptr. 186] [constitutional to permit *prosecution* to establish defendant's incompetence by mere preponderance of evidence]; *People v. Eckstrom* (1977) 71 Cal.App.3d 259, 261-262 [139 Cal.Rptr.341] [constitutional to require defendant to prove his *insanity*].) The cases from the state and federal jurisdictions are in conflict on the constitutional propriety of placing on the defendant the burden of proving his own incompetence.

Some cases suggest that due process principles forbid requiring a defendant whose competence is in doubt to carry the proof burden. (See *United States* ex rel. *Bilyew v. Franzen* (7th Cir. 1982) 686 F.2d 1238 (*Bilyew*); *United States v. DiGilio* (3rd Cir. 1976) 538 F.2d 972, 986-989, cert. den. 429 U.S. 1038 [50 L.Ed.2d 749, 97 S.Ct. 733] (*DiGilio*); *State v. Jones* (S.D. 1987) 406 N.W.2d 366, 368-369 [decision based on state constitutional law]; *People v. McCullum* (1977) 66 Ill.2d 306 [362 N.E.2d 307, 310-311] [same].)

Other cases find no due process or other constitutional objection to placing the proof burden on a defendant who has asserted his own incompetence. (See *Lowenfield v. Phelps* (5th Cir. 1987) 817 F.2d 285, 294, sub. opn. (1988) 484 U.S. 231 [98 L.Ed.2d 568, 108 S.Ct. 546]; *State v. Pruitt* (1984) 18 Ohio App.3d 50 [480 N.E.2d 499, 509] [conc. opn.]; cf. Robinson Criminal Law Defenses (1984) § 208(c), p. 505 [burden of production "is usually on the party seeking to establish the incompetency; this is usually the defendant"]; *State v. Pedersen* (Iowa 1981) 309 N.W.2d 490, 496 [same].)

The first line of cases stresses the unfairness of requiring a defendant who might be incompetent to shoulder the burden of proving it. In *DiGilio*, for example, the court observed that the United States Supreme Court had found it "contradictory" to suggest that a defendant may be incompetent yet capable of knowingly waiving his right to raise the issue. (538 F.2d at p. 988, citing *Pate v. Robinson, supra*, 383 U.S. at p. 384 [15 L.Ed.2d at p. 821].) According to *DiGilio*, it is similarly contradictory to argue that a possibly incompetent defendant is nonetheless presumed to process sufficient intelligence to adduce evidence of his incompetency. (538 F.2d at p. 988.)

DiGilio involved federal procedure, and thus had no occasion to discuss the constitutionality of state statutes allocating the proof burden to the defendant. But in *Bilyew, supra*, 686 F.2d 1238, the court found unconstitutional an Illinois statute that placed the burden of proving incompetence on the defendant. The court stated "There is little question that the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised. [Fn. omitted.] Every court that has considered the issue has so held. [Citations.]" (*Id.*, at pp. 1244-1245.)

The *Bilyew* court agreed with the reasoning of Illinois state court decisions (e.g., *People v. McCullum, supra*, 362 N.E.2d 307, 310-311) that if we assume a defendant is incompetent and unable to cooperate with counsel, it would be a "strange rule" to impose on him the burden of proving his incompetence for the very disability he seeks to prove may render him incapable of proving it. (*Bilyew, supra*, 686 F.2d at p. 1245.)

On the other hand, despite *Bilyew's* assertion, there is substantial authority supporting a contrary view. The United States Supreme Court has consistently upheld state statutes imposing on the defendant the burden of establishing his own *insanity*, despite the possibility that his mental condition may well prevent an effective showing. (*Leland v. Oregon* (1952) 343 U.S. 709, 798-799 [96 L.Ed. 1302, 1308-1309, 72 S.Ct. 1002] (*Leland*); see *Martin v. Ohio* (1987) 480 U.S. 228, 236 [94 L.ED.2d 267, 275-276, 107 S.Ct. 1098] [upholding, against due process attack, Ohio statute placing proof burden on defendant claiming self-defense]; see also *Rivera v. Delaware* (1976) 429 U.S. 877 [50 L.Ed.2d 160, 97 S.Ct.226] [dis. opn. on dismissal of appeal].)

In *Leland*, the high court upheld an Oregon statute requiring the defendant in a criminal case to prove his insanity beyond a reasonable doubt. The court observed that the state must prove only those facts encompassing elements of the crime charged, and sanity is not such an element. (343 U.S. at pp. 798-799 [96 L.Ed.2d at pp. 1308-1309].) The court rejected a due process challenge, stating that "we are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." (*Id.*, at p. 799 [96 L.Ed. at p. 1309].)

Leland remains good law. As the high court recently indicated in upholding an Ohio statute requiring the defendant to carry the burden of proving *self-defense*, *Leland* has withstood repeated challenge (see, e.g., *Rivera v. Delaware, supra*, 429 U.S. 877) and is "authority for our decision today." (*Martin v. Ohio, supra*, 480 U.S. at p. 236

[94 L.Ed.2d at p. 276]; see also *Patterson v. New York* (1977) 432 U.S. 197, 201-205 [53 L.Ed.2d 281, 286-289, 97 S.Ct. 2319] [following *Leland*].) If we applied *Leland* to present case, section 1369 seemingly would survive a federal due process attack, for defendant's competence to stand trial bears only on his mental state and is no more an element of the crime charged than is his sanity. (See *State v. Jones, supra,* 406 N.W.2d 366, 368-369 [acknowledging *Leland* controls federal due process question as applied to competency proof allocation, but adopting different rule under South Dakota Constitution]; cf. *People v. Fields* (1965) 62 Cal.2d 538, 540 [42 Cal.Rptr. 833, 399 P.2d 369, 16 A.L.R.3d 708] [competency proceeding not criminal in nature]; *People v. Bye, supra,* 116 Cal.App.3d 569, 574 [same].)

Thus, a recent federal case, *Lowenfield v. Phelps, supra,* company with the *DiGilio* and *Bilyew* cases previously discussed, and upheld a Louisiana statute that, like section 1369, placed on defendant the burden of proving, by a preponderance of the evidence, his incompetence to stand trial. First, the court observed that no other federal circuit had adopted a contrary approach, and noted that *Bilyew* uncritically adopted Illinois state court cases on the issue. Second, *Lowenfield* reasoned that, although *Congress* unquestionably had placed on federal prosecutors the burden of proving the defendant's competence (e.g., 18 U.S.C.§ 4241), that fact did not support *Bilyew*'s assumption that the federal *Constitution* requires the states to conform to federal law. *Lowenfield* noted that, as indicated in *Leland v. Oregon, supra,* 343 U.S. 790, 798-799 [96 L.Ed.1302, 1308-1309], the states ordinarily have great latitude decide the proper placement of proof burdens.

Accordingly, the *Lowenfield* court concluded, "We see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant merely because Congress chose to place that burden on the government in federal prosecutions." (817 F.2d at p. 294.)

We conclude that the Fifth Circuit's holding in *Lowenfield v. Phelps, supra,* 817 F.2d 285, correctly expresses the applicable due process principles under the federal Constitution. As for defendant's suggestion that we adopt a different rule under the California Constitution, we believe that sound practical and policy considerations support *Lowenfield*.

In determining the propriety of a particular allocation, a critical factor is the extent to which either party has access to the relevant information. As stated in *Morrison v. California* (1934) 291 U.S. 82, 89 [78 L.Ed. 664, 669-679, 54 S.Ct. 281], due process generally allows shifting to the defendant the burden of proving his affirmative defenses if, "upon a balancing of convenience or of the opportunities for knowledge," the burden shift does not subject the defendant to hardship or oppression. (See also *Harris v. Irish Truck Lines, Inc.* (1974) 11 Cal.3d 373, 378 [113 Cal.Rptr. 489, 521 P.2d 481]; 1 Witkin, Cal. Evidence (3d ed. 1986) §§ 137-138, pp. 119-121 [citing cases stressing importance of one party's knowledge or access thereto in allocating proof burden].)

Applying this principle to the present case, one might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's competency inquiry. Indeed, this

analysis affords a satisfactory answer to *Bilyew's* (*supra*, 686 F.2d 1238) concern about the defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability. The People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings.

In addition to asserting the invalidity of the proof allocation in section 1369, defendant also challenges the presumption of competence set forth therein. According to defendant, it is irrational to preserve that presumption *after* a doubt arises regarding defendant's competence. We believe the issue is controlled by the cases and analysis previously set forth regarding the allocation of the proof burden. The primary significance of the presumption of competence is to place on defendant (or the People, if they contest his competence) the burden of rebutting it. By its terms, the presumption of competence is one which affects the burden of proof and, accordingly, it remains in effect despite the introduction of some evidence of incompetence. (See Evid. Code, §§ 500, 550, 603-605.) We decline to hold as a matter of due process that such a presumption must be treated as a mere presumption affecting the burden of production, which disappears merely because a preliminary, often undefined and indefinite, "doubt" has arisen that justifies further inquiry into the matter.

We conclude that section 1369 passes constitutional muster under both the federal and state Constitutions. Accordingly, we need not address the People's alternative

contention that any error in proof allocation was harmless in light of the "clear evidence" of defendant's competence. (Compare *Lowenfield v. Phelps*, *supra*, 817 F.2d at p. 295, with *Bilyew*, *supra*, 686 F.2d at p.1245.)

B. *Improper Opinion Testimony*

Next, defendant contends the court erred in permitting the prosecutor, over objection, to elicit an opinion from a nonexpert witness regarding defendant's mental state and degree of awareness while in jail. The point lacks merit.

As previously indicated, at the competency hearing both parties elicited expert and nonexpert testimony regarding defendant's state of mind. Thus, in addition to psychiatric experts, the People called J. D. Green, a deputy sheriff, who testified that he conversed with defendant in 1986 at the Orange County jail following his arrest. The conversation concerned defendant's "housing" situation, and his need for protective custody. According to Deputy Green, he was able to communicate with defendant, who understood the conversation and was "very responsive" and "very descriptive" in discussing his housing problem.

In addition to Deputy Green and several psychiatric experts, the People called Richard Negrette, defendant's former parole officer, who testified (over defendant's objection) that defendant acted rationally during their conversations in 1984. Defendant likewise called some lay persons to testify regarding his incompetence, including his sister and a defense investigator, each of whom

related defendant's difficulty in conducting a rational conversation.

Defendant argues that because the sole issue at the competency hearing concerned his ability to understand the nature of the criminal proceedings and to assist his counsel (see § 1367), Deputy Green's nonexpert opinion regarding defendant's state of mind was irrelevant and inadmissible. Defendant observes that Green's many years of law enforcement experience did not qualify him as an expert in judging a suspect's state of mind. (See *People v. Kelly* (1976) 17 Cal.3d 24, 39 [130 Cal. Rptr. 144, 549 P.2d 1240]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40 [187 Cal.Rptr. 497] [inadmissible police testimony regarding defendant's character and veracity]; Evid. Code, § 720, subd. (a).) Defendant also asserts that Green was unqualified to express an opinion as a *lay* witness. (See *People v. Melton* (1988) 44 Cal.3d 713, 744 [244 Cal.Rptr. 867, 750 P.2d 741] [inadmissible lay opinion regarding defendant's veracity].)

The People concede that Deputy Green was not am expert qualified to state an opinion regarding defendant's state of mind, but they argue he was adequately qualified to state a lay opinion as to whether defendant understood what Green was saying. (See Evid. Code, § 800; *People v. Farmer* (1989) 47 Cal.3d 888, 908 [254 Cal.Rptr. 508, 765 P.2d 940] [discretionary to admit lay opinion testimony].) The People observe that, unlike *Melton* and *Sergill*, both *supra*, Deputy Green was not asked his opinion regarding defendant's *veracity*, but simply whether defendant appeared to understand their conversation.

In light of the discretion vested in the trial court to permit lay opinion testimony, the nature of the other evidence admitted at the competency hearing, and the rather limited responses elicited from Deputy Green, we see no error. Similar testimony from police or jail personnel regarding the defendant's apparent mental state has been admitted in at least one other capital case (see *People v. Ghent* (1987) 43 Cal.3d 739, 752 [239 Cal.Rptr.82, 739 P.2d 1250] [testimony of interrogating officer that defendant did not seem disoriented]; cf. Evid. Code,§ 870, subd. (c) [opinion of person's "sanity"]), and the challenged testimony appears reasonably relevant to the question whether a defendant is presently able to communicate with his counsel at trial. As the trial court acknowledged in this case, objections to such lay testimony relate more to weight than to admissibility.

C. *Evidence of Defendant's Prior Crimes and Convictions*

Next, defendant asserts the prosecutor, during the competency hearing, committed misconduct in presenting evidence and argument regarding defendant's prior criminal acts and convictions. Defendant observes that evidence was admitted regarding (1) his 1968 conviction for firing a shotgun in a bar, (2) his 1977 rape, kidnapping and lewd conduct convictions, (3) his status as a registered sex offender and parolee, and (4) his various violent acts committed while in custody.

Most of these matters were first elicited *without objection*, on cross-examination of defense experts, for the proper purpose of determining the facts on which they

based their opinions regarding defendant's incompetence. (See *People v. Malone* (1988) 47 Cal.3d 1, 31-32 [252 Cal.Rptr. 525, 762 P.2d 1249]; *People v. Hendricks* (1988) 44 Cal.3d 635, 642 [244 Cal.Rptr. 181, 749 P.2d 836].) Defendant maintains, however, that the prosecutor should not have made further reference to these matters (which remained largely unproved or without proper foundation) in his closing arguments. Defendant observes he made proper objection to these arguments. (See *People v. Green* (1980) 27 Cal.3d 1, 27 [164 Cal. Rptr. 1, 609 P.2d 468].) He contends the prosecutor's remarks "placed undue emphasis on [his] violent background," thereby shifting the focus of the hearing from competency to "propensity to commit 'bad acts. . . . "

We have reviewed the record and find no misconduct. The prosecutor simply outlined the competency hearing testimony, and the facts on which that testimony was based, including occasional references to defendant's prior acts and convictions. Throughout his argument, the prosecutor explained to the jurors that his comments were not evidence, that the sole issue then before them was defendant's competence, and not his guilt of any crimes, and that any evidence of such crimes was introduced for the sole purpose of determining the competency issue, and not to show that defendant was "a bad guy."

The trial court similarly instructed the jury that the prosecutor's comments were not evidence, and that any evidence introduced for a limited purpose, including the exhibits containing references to defendant's prior criminal record, should be considered only for that purpose.

We conclude the jury's competency finding should be upheld.

III. GUILT PHASE CONTENTIONS

A. *Failure to Discharge Venire*

Defendant argues the court erred in failing to discharge the entire jury venire after learning that some prospective jurors indicated they were biased against defendant. Prospective juror Sturgeon stated on voir dire that she had heard her fellow venirepersons make statements such as "even his own lawyers think he's guilty," and "they ought to have [sic] him and get it over with."

At defendant's request, the court held a hearing on the matter. On further examination, Sturgeon asserted that at least five prospective jurors had made such remarks, and she identified some persons who she believed had either made such comments or had overheard them being made. Prospective juror Durling confirmed that he and a few other venire persons, while in the court elevator, had made statements such as "in frontier justice style," the authorities should "bring the guilty S.O.B. in we'll give him a trial and then hang him." Prospective juror Clasen stated he had heard similar comments from other venirepersons.

Defendant thereupon moved to discharge the entire venire, on the ground that it had become tainted and further inquiry would only aggravate the situation. The trial court denied the motion without prejudice to a renewed motion following further voir dire. Defendant declined to conduct such voir dire, asserting it would be

impossible to further explore juror bias without antagonizing the jurors and creating added bias against defendant.

The People observe that none of the prospective jurors implicated during the bias hearing actually served on defendant's jury, and each person selected for the jury affirmed his or her ability to be fair and impartial. Moreover, the people note that defendant failed to exhaust his peremptory challenges and accordingly, cannot complain of any error in failing to exclude particular jurors. (*See e.g., People v. Coleman* (1988) 46 Cal.3d 749, 770-771 [25] Cal.Rptr. 83, 759 P.2d 1260].) We question the application of the foregoing rule to situations in which the defendant complains of a failure to discharge an entire venire, for we could not expect the defendant to expend his peremptory challenges in a vain attempt to exclude every member of the venire. But for other reasons, we think the People's basic position has merit.

We believe the trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required. Defendant cites no case, and we have found none, indicating that such a drastic remedy is appropriate as a matter of course merely because a few prospective jurors have made inflammatory remarks. Unquestionably, further investigation and more probing voir dire examination may be called for in such situations, but discharging the entire venire is a remedy that should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the

defendant. The present case falls short of that mark. We conclude the trial court did not err in declining to discharge the entire venire.

B. *The Adoptive Admissions Rule*

Shortly after defendant's arrest, his sister Sylvia Ayala visited him in jail. She asked him "why did you have to shoot those three poor boys?" Defendant initially made no response. After embracing his sister, he later indicated he did not wish to talk about the matter. Soon thereafter, however, defendant told his sister that "every dog has his day, every cat has his night," and he mentioned the Bible and the Book of Revelations.

Over defendant's hearsay objection, the trial court admitted evidence of the foregoing conversation, ruling that defendant's initial silence in response to his sister's inquiry was admissible as a possible adoptive admission should the jury so find. (See Evid. Code, § 122 [statement by another may be deemed adopted by party's "words or other conduct"]; *People v. Silva* (1988) 45 Cal.3d 604, 623-625 [247 Cal.Rptr. 573, 754 P.2d 1070].) Defendant, relying on self-incrimination and due process principles derived from the Fifth and Fourteenth Amendments to the United States Constitution, now contends that the premise underlying the adoptive admissions rule (namely, that silence in the face of an accusatory statement may constitute an admission of guilt), is invalid and irrational. According to defendant, the rule "unconstitutionally penalizes constitutionally protected conduct," i.e., the right to remain silent following arrest.

Defendant cites authorities suggesting that in the criminal context, it is unreasonable to expect the accused to respond to an accusation of guilt. (*E.g., Gamble, The Tacit Admissions Rule: Unreliable and Unconstitutional.* (1979) 14 Ga.L.Rev. 27; *Commonwealth v. Vallone* (1943) 347 Pa. 419 [32 A.2d 889, 892] [dis. opn.].) Indeed, once *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R. 3D 974]) warnings have been given, it may be constitutionally improper to introduce evidence of an accused's postarrest silence. (*See Fletcher v. Weir* (1982) 455 U.S. 603, 605-607 [71 L.Ed.2d 490, 493-494, 102 S.Ct. 1309]; *Doyle v. Ohio* (1976) 426 U.S. 610, 619 [49 L.Ed.2d 91, 98, 96 S.Ct. 2240].) The record fails to show that defendant was given *Miranda* warnings prior to his conversation with his sister. Although the record contains a bar assertion to that effect from trial counsel, the record is otherwise silent on the matter, and it seems doubtful that counsel had personal knowledge of the facts as he was not present during the interrogation.

Appellate counsel now asks us to take judicial notice of a purported police report and related transcript of a police interrogation with defendant in which such warnings were given, but counsel has made no attempt to authenticate or certify either the report or the transcript. (See *Goshgarian v. George* (1984) 161 Cal.App.3d 1214, 1225 [208 Cal.Rptr. 321]; *People v. Preslie* (1977) 70 Cal.App.3d 486, 494-495 [138 Cal.Rptr. 828]; Cf. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3 [219 Cal.Rptr. 13, 706 P.2d 1146].) Accordingly, the motion is denied.

But even if we assume for purposes of argument that such warnings were given here, in the context of the

present case, where defendant was engaged in conversation with his own sister, it was not unreasonable to permit the jury to draw an adverse inference from his silence in response to her inquiry as to why he shot the victims.

The record does not suggest that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right. Defendant's conversation with his sister apparently was not monitored, for the officers learned of Mrs. Ayala's accusation and defendant's response when she talked to them, after the interview. We are not here concerned with, and do not address, the situation in which an in-custody, *Mirandized*, suspect is confronted with an accusatory statement in circumstances where he may be presumed to suspect the monitoring of his conversation. We also not decide whether, in such circumstances, application of the adoptive admissions rule would be unfair, essentially requiring the defendant to respond to avoid an adverse inference of guilt if he remains silent.

As we recently explained, "to warrant admissibility, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. [Citation.]" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011 [254 Cal.Rptr. 586, 766 P.2d 1].) In the present case, the jury was not directed to draw an inference of guilt, but was merely told (CALJIC No. 2.71.5) that defendant's silence "may be considered against him as indicating an admission that the accusation thus made

was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement."

In *People v. Silva, supra,* 45 Cal.3d at page 624, where a similar instruction was given, we observed that if a defendant remains silent in the face of an accusatory statement from a person *other* than a police officer, his silence " 'lead[s] reasonably to the inference that he believes the accusatory statement to be true.' . . . Here, defendant [Silva] heard Shelton describe the circumstances surrounding Kevin's murder . . . and smiled without protesting or denying Shelton's description. . . . this evidence was sufficiently relevant to be submitted to the jury under appropriate instructions." (Quoting from 1 Jefferson, Cal.Evidence Benchbook (2d ed. 1982) § 3.3, p. 175.)

In sum, although as previously indicated the use of the adoptive admissions rule may be unwarranted in some situations, including some custodial interrogations, we see no valid constitutional objection to its application in cases where the defendant reasonably could be expected to respond to, and deny, the accusatory statement. (See also *Silva, supra,* 45 Cal.3d at pp. 623-625.) Thus, we reject defendant's broad constitutional challenge to the adoptive admissions rule.

C. *Ayala's Police Agent Status*

In a related argument, defendant contends the trial court erred in failing to afford him the opportunity to demonstrate that his sister, Silvia Ayala, was acting as a police agent at the time she met with him in jail as previously discussed. The point lacks merit.

At the foundational hearing aimed at determining the admissibility of evidence of defendant's adoptive admission, evidence was adduced indicating that Mrs. Ayala had previously been told by police officers of the charges against defendant, and that she was allowed by the officers to visit him in private. Although Mrs. Ayala was not asked by the police to discuss the charges with defendant, she was interrogated by a police investigator immediately *following* her visit. As previously indicated, Mrs. Ayala related defendant's conduct and statements to the officers.

Defense counsel, evidently hoping to establish that the officers were giving Mrs. Ayala special treatment, asked her whether they had informed her of the jail policy to allow defendant no visitors other than an attorney or bondsman. The prosecutor's hearsay objection was sustained. Defendant did not call police personnel to directly establish jail visitation policy, or to determine whether the officers informed Mrs. Ayala regarding such policy. Nor did defendant ask the officers about her possible status as a police agent.

Defendant now complains he was improperly foreclosed from attempting to establish Mrs. Ayala's police agent status by showing that she [sic] been given special visitation privileges in return for eliciting inculpatory

statements from her brother. (See, e.g., *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 [91 L.Ed.2d 364, 384-385, 106 S.Ct. 2616]; *Rhode Island v. Innis* (1980) 446 U.S. 291, 301 [64 L.Ed.2d 297, 308, 100 S.Ct. 1682].)

None of the police agent cases cited by defendant indicates that it would have been improper for the officers to grant an inmate's relatives special visitation privileges in the *unspoken* hope that they might elicit statements from defendant and inform the officers hereof. (See *Arizona v. Mauro* (1987) 481 U.S. 520, 529 [95 L.Ed.2d 458, 468, 107 S.Ct. 1931].) In any event, it is apparent that defendant had ample opportunity to explore the issue through his own examination of the police officers, yet he failed to do so. The people's successful hearsay objection certainly did not preclude such alternate methods of inquiry.

Defendant suggests his trial counsel may have been incompetent in failing to pursue such further inquiry. Yet it is entirely possible counsel tactically declined to pursue the matter, doubting he could establish that defendant's sister was an agent of the government and acting against his best interests. (See *People v. Pope* (1979) 23 Cal.3d 412, 426 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].)

Moreover, to establish grounds for relief based on incompetence of counsel, defendant must show a reasonable probability that, but for counsel's omissions, the verdict would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 697-698, 104 S.Ct. 2052].) No such showing is made here. Defendant has not demonstrated that further inquiry would have established Mrs. Ayala's status as a police agent, or that

as a consequence defendant's adoptive admission would have been excluded. Thus, we have no basis for concluding counsel's omission prejudiced defendant's case.

D. *Failure to Preserve Evidence*

The officers investigating the murder of Douglas Metal found a Perrier bottle lying atop a freezer at the dairy where he worked. Officer Barnes took one fingerprint from the bottle, but inadvertently failed to retain the bottle itself, which was lost or destroyed. At trial, the print was identified by a prosecution expert as matching defendant's prints; a defense expert disputed the identification. Both prosecution and defense experts agreed, however, that the print bore two unexplained "points of dissimilarity."

Defendant moved to exclude the print evidence based on the People's failure to preserve the bottle. The trial court denied the motion on the basis that exclusion of evidence for failure to preserve other evidence is appropriate only if the exculpatory value of the lost evidence was apparent to the police *before* its loss. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489 [81 L.Ed.2d 413, 421-422, 104 S.Ct. 2528]; see *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234 [255 Cal.Rptr. 569, 767 P.2d 1047] [adopting *Trombetta* rule].) In *Johnson*, the defendant similarly argued that inculpatory fingerprint evidence should be excluded because the People improperly failed to preserve a catalog bearing those prints. We rejected the argument because the catalog "did not have an exculpatory value that was obvious at the time of the test. . . ." (47 Cal.3d at p. 1235.) Here, of course, the investigating

officer likewise could not know at the time the prints were taken whether, or to what extent, the Perrier bottle's print matched defendant's prints.

Defendant now argues the court should have instructed the jury sua sponte that, because of the police officer's negligent failure to preserve the bottle, the jury should draw any conflicting inferences regarding the prints. In favor of defendant. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 54-55 [102 L.Ed.2d 281, 287, 109 S.Ct. 333] [similar instruction given by trial court].) In addition, defendant would require a sua sponte instruction that, by reason of their failure to preserve the bottle, the People's fingerprint evidence should be viewed with "distrust." We reject both contentions.

Once the defendant has proved a loss of material evidence, the trial court has discretion to impose appropriate sanctions, including fashioning a suitable cautionary instruction. (see *People v. Zamora* (1980) 28 Cal.3d 88, 99-103 [167 Cal.Rptr. 573, 615 P.2d 1361]; *People v. Gonzales* (1989) 209 Cal.App.3d 1228, 1233, 1234 [257 Cal.Rptr. 828].) But neither *Trombetta* nor *Youngblood* held that instructions such as those proposed by defendant are required sua sponte, and we are reluctant to impose such an instructional sanction for mere negligence in failing to preserve evidence whose exculpatory value was unapparent to the officers when their omission occurred. *Youngblood* held that the defendant must show the police acted in "bad faith" in order to demonstrate a due process violation based on failure to preserve potentially useful evidence. (488 U.S. at p. 51 [102 L.Ed.2d at p. 289].) The court merely noted in passing that the trial court

gave the instruction cited by defendant herein. (*Id.* at p. 287.)

The Courts of Appeal have uniformly rejected claims of error grounded on the failure to give similar instructions. (see *People v. Huston* (1989) 210 Cal.App.3d 192, 212-215, & fn. 5 [258 Cal.Rptr. 393]; *People v. Gonzales, supra*, 209 Cal.App.3d 1228, 1233-1234; *People v. Martinez* (1989) 207 Cal.App.3d 1204, 1218 [255 Cal.Rptr. 691].) None of these cases indicates any basis for a sua sponte instruction of the kind given in *Youngblood*, if no bad faith failure to preserve exculpatory evidence is involved. We conclude that, under the circumstances of this case, the trial court did not err in failing to instruct sua sponte that any conflicting inferences should be drawn in defendant's favor, or that the People's evidence should be viewed with distrust.

E. *Prosecutorial Misconduct*

1. *Attack on expert testimony* – Defendant contends the prosecutor improperly mounted a personal attack on Lee Smith, one of the defense experts. Smith, who was qualified as a fingerprint expert, testified that the print on the Perrier bottle did not match defendant's prints. (As previously indicated, a People's expert disagreed.) In his closing guilt phase arguments, the prosecutor accused Smith (among other things) of "prostituting" the judicial system, of "selling out," and of earning "a thousand dollars on this case." According to the prosecutor, Smith was "motivated solely by greed" and "dishonest." The prosecutor reviewed evidence disclosing that Smith had participated as a paid expert in several prior criminal

trials in which his prodefense opinions were challenged and ultimately rejected.

Defendant maintains the prosecutor's attack on Smith exceeded the proper bounds of fair comment on an expert's credentials or credibility. Although the prosecutor was entitled to point out that Smith was a paid expert and to otherwise question his competency or credibility based on evidence in the record (see Evid. Code, §§ 722, subd. (b), 721, subd. (a); *People v. Washington* (1969) 71 Cal.2d 1061, 1086 [80 Cal.Rptr. 567, 458 P.2d 479]), defendant submits that the accusations of "prostitution," dishonesty and greed were unnecessary and excessive (see *People v. McGreen* (1980) 107 Cal.App.3d 504, 514-519 [166 Cal.Rptr. 360] [prosecutor accused defense expert of selling his credentials, and being a "habitual and chronic liar"]).

We need not decide whether the prosecutor's remarks exceeded fair comment on the evidence elicited at trial, because defendant failed to object to the foregoing comments or seek an appropriate admonition, and must be deemed to have waived his objection. (See *People v. Edelbacher, supra,* 47 Cal.3d at p. 1030; *People v. Green, supra,* 27 Cal.3d 1, 27.) Although defendant suggests the misconduct was so pervasive and offensive that an admonition would have been useless (see *McGreen, supra,* 107 Cal.App.3d at p. 519), a timely objection and admonition by the court at the outset might have tempered the prosecutor's aggressiveness *before* it became so extreme. That being so, it seems reasonable to place on defendant the burden of making a timely objection.

We likewise reject defendant's assertion that counsel's failure to object may have reflected his incompetence. As we have previously noted herein, to obtain relief on incompetent counsel grounds, defendant must show a reasonable probability that his counsel's omission affected the verdict. (*Strickland v. Washington, supra,* 466 U.S. 668, 694 [80 L.Ed.2d 647, 697-698].) We have no sound basis for reaching such a conclusion here.

2. *Comments on Defendant's Courtroom Behavior* – On two separate occasions during the guilt phase, the prosecutor commented on defendant's nontestimonial conduct. First, during the prosecutor's examination of defendant's sister regarding a tape recording of an interview with police officers, defendant evidently began laughing, prompting the prosecutor to observe that "the defendant apparently thinks [the tape recording is] funny." The court admonished the prosecutor and defendant not to engage in further "colloquy," and defendant remarked "Can't help it, your honor."

The second occasion arose when the prosecutor in closing argument characterized defendant as "a cold calculating, cowardly killer," who placed his victims on the ground before executing them. Defendant interrupted the argument by stating "I think you are chickenshit," and the prosecutor thereupon replied "He can do it right now; he can mouth off right now because he knows there's nothing going to happen. He's all secure over there right now, and he doesn't have the guts to face what's [sic] he's doing here. And that's why he has to mouth off." Although defense counsel told defendant to "stop it" after his interjection was made, counsel made no objection to the prosecutor's response.

Defendant, observing that he elected not to testify at trial, contends the prosecutor committed misconduct in commenting on his "demeanor." (See *People v. Heishman* (1988) 45 Cal.3d 147, 197 [246 Cal.Rptr. 673, 753 P.2d 629] [general rule prohibiting comment on nontestifying defendant's courtroom behavior]; *People v. Garcia* (1984) 160 Cal.App.3d 82, 93 [206 Cal.Rptr. 468] [prosecutor's improper comment on defendant's "snickering" at witness's testimony]; *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 979-980 [comment on nontestifying defendant's laughter during testimony].)

First, we note that defendant failed to object to the prosecutor's comments, or seek an admonition, and accordingly any claim of error was waived. (*People v. Green, supra,* 27 Cal.3d 1, 27; see *People v. Gilliam* (1974) 41 Cal.App.3d 181, 194-195 [116 Cal.Rptr. 317] [failure to object to prosecutor's comments on defendant's smiling during prosecutor's argument].) Second, the prosecutor's brief comment on defendant's laughter was so minor as to be entirely harmless. The jury was not asked to draw any adverse inferences of guilt from defendant's conduct.

Finally, although the prosecutor's subsequent comments were somewhat more serious, incorporating defendant's "chickenshit" remark into the prosecutor's theme of defendant's cowardice and cruelty, in context, the prosecutor was simply reacting spontaneously to defendant's gratuitous interruption of the proceedings, rather than commenting reflectively on his demeanor. Under the circumstances, any misconduct was harmless. The evidence of defendant's guilt was substantial; no defense was offered other than an attempt to dispute the fingerprint evidence tying him to *one* of the three murders. As in

Garcia, supra, 160 Cal.App.3d at page 95, and *Gilliam, supra,* 41 Cal.App.3d at pages 194-195, we conclude that any prosecutorial misconduct in the present case was likewise nonprejudicial. It was not reasonably probable that a more favorable result would have occurred had the prosecutor's comments not been made. (See *Garcia,* at p. 93, & fn. 12.) In addition, we do not find it reasonably possible the asserted misconduct affected the jury's penalty deliberations.

F. *Shackling Defendant*

Before trial, the prosecutor moved to shackle defendant, based on his prior record and history of violence, including a long list of disturbances and assaults while in custody. (Defendant was muscular, weighed over two hundred and thirty pounds and was around six feet three inches tall.) The prosecutor agreed, however, to allow defendant to remain unshackled as long as he behaved properly; defendant was so advised and he stated he understood. Nonetheless, during the competency phase testimony, he suddenly cried out, stood up and turned over the counsel table. Accordingly, the court ordered defendant shackled for the remainder of the trial, despite defendant's subsequent promise to behave. (On one occasion, defendant objected to being photographed stating that if he were not "chained up" he would have thrown his chair at the photographer.)

Defendant first contends that the court abused its discretion in ordering him shackled without considering less drastic measures of maintaining security. He

observes that the applicable authorities have characterized shackling as a "last resort" to be used where a manifest need therefor arises and no lesser measures would suffice. (See *Illinois v. Allen* (1970) 397 U.S. 337, 343-344 [25 L.Ed.2d 353, 358-359, 90 S.Ct. 1057]; *People v. Allen* (1986) 42 Cal.3d 1222, 1261-1265 [232 Cal.Rptr. 849, 729, P.2d 115]; *People v. Duran* (1976) 16 Cal.3d 282, 290 [127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1].)

Defendant recognizes that recent cases of this court have upheld shackling in similar situations involving defendants who have a prior record of violence or who have displayed violent behavior in the courtroom. (*E.g., People v. Sheldon* (1989) 48 Cal.3d 935, 945-946 [258 Cal.Rptr. 242, 771 P.2d 1330]; *People v. Hamilton* (1985) 41 Cal.3d 408, 423-424 [221 Cal. Rptr. 902, 710 P.2d 981].) Based on our holdings in those cases, we find no abuse of discretion here, where the record on its face demonstrated a manifest need to shackle defendant following his violent behavior.

Defendant also complains of the court's failure to instruct the jury, sua sponte, that the restraints "should have no bearing on the determination of the defendant's guilt." (*Duran, supra,* 16 Cal.3d at pp. 291-292.) *Duran* required such an instruction in cases which the restraints were visible to the jury prior to its *guilt* determination. (*Ibid.*) Here, as the People point out, although there are indications that some *prospective* jurors noticed defendant's shackles during voir dire examination, nothing in the record indicates the shackles were visible to the jury which determined his guilt. Although defendant testified during the *sanity* phase, and we may infer that his

shackles were then viewed by the jury, the risk of substantial prejudice to a shackled defendant is diminished once his guilt has been determined.

Even assuming the court erred in failing to frame an instruction on shackling, the error was not prejudicial. In *Duran,* our reversal of the judgment was based on a combination of errors in a close case, including improper exclusion of evidence, restrictive cross-examination, and the shackling of a defendant who elected to testify at the guilt phase. As we noted in *Duran,* the defendant's visible wrist and ankle restraints could have damaged his credibility as a witness. (16 Cal.3d at p. 296.)

In the present case, defendant did not testify at the guilt phase, and the failure to admonish the jury to ignore his shackles was unaccompanied by other substantial errors. We conclude that any error in failing to instruct more directly on the shackling issue was harmless. (See *People v. Rich* (1988) 45 Cal.3d 1036, 1084-1085 [248 Cal.Rptr. 510, 755 P.2d 960].)

G. *Use of Mannequins*

Defendant next contends the court erred in allowing the prosecution to display three life-size mannequins throughout the course of the trial. These mannequins were designed with rods sticking through them to show the bullet trajectories as to the three murder victims, some of whom may have been executed while in a helpless position. In addition, the prosecution placed one victim's bloodstained shirt on a mannequin for similar display purposes.

The mannequins were formally entered in evidence at the guilt phase, remained in the courtroom (over defendant's objection) during the guilt phase and the penalty phase arguments and, along with the other exhibits, accompanied the jury into the jury room during penalty phase deliberations. Defendant complains that the "brooding omnipresence" of these "constant accusers" could only have prejudiced him. As the People observe, however, the mannequins were properly admitted in evidence as part of the case-in-chief (see *People v. Brown* (1988) 46 Cal.3d 432, 442-443 [250 Cal.Rptr. 604, 758 P.2d 1135]), and the trial court took reasonable steps to minimize any prejudicial effect on the jurors.

After defendant objected to the continued presence of the mannequins in the courtroom, the trial court ordered them placed so that they would not face the jury. In addition, they were removed from the jury's view during the sanity phase and most of the penalty phase. Thereafter, when defendant objected to their presence in the jury deliberation room, the court observed that, having been admitted in evidence, the mannequins properly should be made accessible to the jury during deliberations. The court believed it might be more prejudicial to defendant to treat the mannequins differently from the other items of physical evidence, and thereby call the jury's further attention to them. The court noted that the mannequins were less objectionable than the photographs originally proposed by the People to illustrate the victims' wounds.

In sum, it is apparent the court carefully exercised its discretion in the matter with a view toward accommodating the respective interests of both parties. Although the

court reasonably could have excluded the mannequins from the jury room, we find no abuse of discretion in the court's contrary ruling. (See *People v. Brown, supra,* 46 Cal.3d at p. 443.) The trial court was in a far better position than we to assess the potential prejudice arising from the display of such physical evidence.

H. *Reinstatement of Withdrawn Insanity Plea*

Defendant originally entered pleas of not guilty and not guilty by reason of insanity. After the competency and guilt phases, defendant successfully moved to withdraw the insanity plea. Two days later, however, defense counsel announced that defendant personally wished to reinstate his insanity plea. Counsel stated his own opinion that his client's decision was tactically unsound, because none of the psychiatrists had testified defendant was legally insane, and a sanity hearing would require him to expose his remaining psychiatric evidence, leaving nothing in reserve for the penalty phase.

The court agreed with counsel's assessment but evidently believed it had no option to deny the motion on purely tactical grounds in view of defendant's personal request. The court thereupon examined defendant, confirmed that reinstatement of the plea was defendant's free and voluntary choice, and ultimately accepted the change of plea. (Defendant explained that he had been taking medication and was "confused" at the time he withdrew his insanity plea.)

Defendant now asserts the trial court erred in failing to exercise discretion in deciding whether to accept the withdrawn plea. As defendant observes, although the

original choice of plea is left to the accused (§§ 1016, 1018), once a plea has been entered the court has discretion to refuse to allow him to withdraw that plea or enter a new plea. (§ 1016; see *People v. Cartwright* (1979) 98 Cal.App.3d 369, 386 [159 Cal.Rptr. 543].) But we think defendant is in no position to complain on appeal of the trial court's order *granting* his request to reinstate his withdrawn plea.

Initially, we observe that prior cases generally have stressed that the decision to plead, or to change or withdraw a plea, is a matter lying within the defendant's, rather than his counsel's, ultimate control, regardless of tactical considerations. (See *People v. Gause* (1975) 15 Cal.3d 709, 717 [125 Cal.Rptr. 773, 542 P.2d 1365] [defendant's personal right to refuse to enter insanity plea]; *People v. Rogers* (1961) 56 Cal.2d 301, 305 [14 Cal.Rptr. 660, 363 P.2d 892] [counsel's improper withdrawal of not guilty plea and entry of guilty plea to lesser offense]; *People v. Redmond* (1971) 16 Cal.App.3d 931, 938 [94 Cal.Rptr. 543] [defendant's qualified right to withdraw insanity plea].)

As we noted in *Gauze, supra,* 15 Cal.3d 709, under the rule in *Redmond, supra,* "a presently sane defendant may withdraw an insanity plea, provided the court is satisfied that the defendant is making a free and voluntary choice with adequate comprehension of the consequences. [Citations.] If a defendant may withdraw an insanity plea, certainly he cannot be compelled to present such a plea. . . . [¶] [He] made a free and voluntary choice with knowledge of its consequences. Neither counsel nor the court had the power to contravene that choice." (15 Cal.3d at pp. 717-718; cf. *People v. Frierson* (1985) 39 Cal.3d 803, 813-818 [218 Cal.Rptr. 73, 705 P.2d 396] [defendant's "fundamental right" to present diminished capacity defense].)

By analogy to *Gauze,* if a defendant cannot be compelled by counsel to present an insanity defense, he cannot be compelled by counsel to abandon one merely because counsel disagrees with the tactics of that decision. Thus, contrary to defendant's present premise, the trial court had no discretion to deny defendant's motion to reinstate his insanity plea solely because his counsel opposed that choice on tactical grounds. We conclude the court did not err in granting defendant's free and voluntary decision to reinstate his previously withdrawn insanity plea.

I. *Failure to Clarify Instructions*

At the sanity hearing, some expert testimony indicated defendant may have been a paranoid schizophrenic, while other experts characterized him as a sociopath. During the jury's deliberations as to defendant's sanity, the jury requested clarification regarding the basic definition of insanity, and the trial court correctly reread the appropriate instructions based on our decision in *People v. Skinner* (1985) 39 Cal.3d 765, 768-769 [217 Cal.Rptr. 685, 704 P.2d 752] (insanity constitutes inability, *resulting from mental illness,* to know nature of one's act or to know whether it was right or wrong). The jury foreman then asked whether paranoid schizophrenia was "the true definition of mental illness," and whether "the term 'sociopath' or 'antisocial personality' is not really a true mental illness?"

After consulting with counsel, and with their approval, the court advised the jury that the court could not directly answer the inquiry, and that the jury should decide the matter on the basis of the evidence in the case.

Defendant now complains the court's response was inadequate because the jury could have been left with the false impression that conditions other than schizophrenia could not be considered mental illness. Defendant observes that the jury's inquiry was more in the nature of a question of law rather than fact, and that a mere review of the evidence would not inform the jury whether "mental illness" for purposes of the insanity test included conditions other than schizophrenia. According to defendant, the court should have explained to the jury that any of the mental illnesses suffered by him could satisfy the insanity standard.

The court's insanity instructions did not limit "mental illness" to schizophrenia, but allowed the jury to consider any "evidence of [defendant's] mental condition before or after the crimes." The instructions stated further that not every form of mental illness constitutes insanity, and that "if you find the defendant was suffering from a mental illness that prevented him from knowing that his acts were morally wrong, then you must find him not guilty by reason of insanity."

Although the foregoing instructions were correct, and the court's rereading of them should have sufficed to clarify the matter, it is also true that the court could have been more explicit in responding to the jury's inquiry. For example, the court might have advised the jury that "mental illness" includes all mental conditions which

produce the requisite effects. But, as explained below, it is unlikely that any such clarification would have aided defendant. (See *People v. Kageler* (1973) 32 Cal.App.3d 738, 746 [108 Cal.Rptr. 235] [showing of prejudice required].)

As was evident from the foreman's inquiry, the jury was primarily concerned with whether a sociopathic personality could qualify as a "mental illness." A similar issue arose in *People v. Fields* (1983) 35 Cal.3d 329, 368-370 [197 Cal.Rptr. 803, 673 P.2d 680], where, as here, the evidence indicated the defendant was a sociopath. We held that "if the defense expert can point to no symptom, no manifestation, of defendant's condition except repeated criminal or antisocial acts, that [sociopathic] condition cannot be considered grounds for finding defendant insane. [Citation; fn. omitted]." (*Id.*, at p. 370.)

Our review of the record reveals the expert testimony outlining defendant's sociopathic personality relied essentially on his antisocial and criminal behavior. Defendant cites no expert testimony relating any additional symptoms or manifestations on which a jury might find a sociopathic mental illness of the kind qualifying for an insanity verdict under the *Fields* standard (*supra*, Cal.3d 329). Thus, on the present record, the trial court's failure to further clarify the instructions could not have prejudiced defendant.

Additionally, we note that defense counsel's approval of the court's limited response to the jury's inquiry should bar defendant from contending on appeal that a more elaborate response should have been made. If defendant desired such a response, he should have proposed it. (See *People v. Kageler, supra*, 32 Cal.App.3d 738,

746; cf. *People v. Kimble* (1988) 44 Cal.3d 480, 503 [244 Cal.Rptr. 148, 749 P.2d 803] [defendant's duty to request clarifying instructions]; *People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [same].) Defendant's suggestion that his counsel was incompetent in acceding to the court's response must be rejected counsel may well have had tactical reasons for not directly raising the question whether his client's sociopathic personality in fact amounted to a bona fide mental illness under *Fields, supra,* 35 Cal.3d 329.

J. *Defendant's Absence from Conferences and Reading of Testimony*

Defendant next asserts he was improperly denied the right to be personally present at various in-chambers conferences and a reading of some guilt phase testimony. (The in-chambers conferences included discussion of defendant's hostile reaction to being photographed, his potential for violence if his shackles were removed, and his self-inflicted injuries. The guilt phase testimony did not involve the three murder charges, but only the assault charge arising from the attempted robbery of victim Yoon.)

In the present case, defendant orally waived his right to be present at the various in-chambers or "bench" conferences, and at the reading of testimony. Defendant now observes that, under section 977, a *written* waiver is required if the defendant is absent "during those portions of the trial when evidence is taken before the trier of fact. . . . " Assuming the quoted language applies to the conferences and reading of testimony involved here, any

error in failing to obtain a written waiver was not prejudicial.

As we stated in *People v. Garrison* (1989) 47 Cal.3d 746, 782 [254 Cal.Rptr. 257, 765 P.2d 419], "Although defendant's oral waiver does not comply with the writing requirements of [section 977], we find no reversible error. Defendant's absence, *even without waiver,* may be declared nonprejudicial in situations where his presence does not bear a 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.' " (Quoting from *People v. Bloyd* (1987) 43 Cal.3d 333, 359-360 [233 Cal.Rptr. 368, 729 P.2d 802] [absence from court conferences and reading of testimony deemed nonprejudicial]; see also *People v. Douglas* (1990) 50 Cal.3d 468, 517-519 [268 Cal.Rptr. 126, 788 P.2d 640] [absence from reading of testimony nonprejudicial]; *People v. Lang* (1989) 49 Cal.3d 991, 1025-1028 [264 Cal.Rptr. 386, 782 P.2d 627] [absence from jury view of murder scene, from conference regarding jury request for clarification, and from reading of testimony nonprejudicial]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1080-1081 [259 Cal.Rptr. 630, 774 P.2d 659] [absence from various hearings and conferences nonprejudicial]; *People v. Robertson* (1989) 48 Cal.3d 18, 59-62 [255 Cal.Rptr. 631, 767 P.2d 1109] [absence from penalty-reduction hearing and sentencing nonprejudicial]; *People v. Grant* (1988) 45 Cal.3d 829, 845-846 [248 Cal. Rptr. 444, 755 P.2d 894] [written waiver]; *People v. Odle* (1988) 45 Cal.3d 386, 406-407 [247 Cal.Rptr. 137, 754 P.2d 184] [waiver of right to personal presence at reading of testimony; jury provided with transcript]; *People v. Hovey* (1988) 44 Cal.3d 543, 585-586 [244 Cal.Rptr. 121, 749 P.2d 776] [absence from reading of testimony nonprejudicial].)

In *Garrison*, *Hovey*, and *Bloyd*, all *supra*, we held that the defendant had failed to carry his burden of demonstrating prejudice arising from his absence from the reading of testimony to the jury. As we stated in *Hovey*, "The reading of testimony ordinarily would not be an event which bears a substantial relation to the defendant's opportunity to defend. . . . " (44 Cal.3d at p. 585.) Under the circumstances here, any error in procedure must be deemed harmless.

In addition, defendant fails to explain in what manner his presence at the various in-chambers conferences could have improved his opportunity to defend the charges against him. His suggestion that his mere presence at these hearings might have assisted the trial court in evaluating his competence to stand trial is entirely speculative and fails to carry his burden of proving prejudice. (See *Hovey, supra*, 44 Cal.3d at p. 585 [rejecting, as speculative argument that jury could have been favorably influenced by watching defendant's reaction to reading of testimony].)

Defendant relies on various federal cases which he claims support a different result, but none of them requires us to adopt his position. Indeed, in several recent cases we have discussed and distinguished each of these federal cases, and we will not repeat that discussion here. (See *People v. Robertson, supra*, 48 Cal.3d at pp. 60-61; *People v. Grant, supra*, 45 Cal.3d at p. 845; *People v. Odle, supra*, 45 Cal.3d at pp. 406-407; *People v. Hovey, supra*, 44 Cal.3d at p. 585.) As the foregoing cases indicate, although some federal appellate decisions contain language to the contrary, the United States Supreme Court has never squarely held that the defendant's presence at

all "critical" phases of trial is mandatory and unwaivable. Thus, assuming the proceedings at issue here should be deemed "critical," no prejudicial error occurred by reason of defendant's voluntary absence therefrom.

K. *Counsel's Absence from Reading of Testimony.*

In related argument, defendant complains that he was denied the assistance of counsel when his trial counsel stipulated that the assault charge testimony could be read to the jury by the court clerk without *counsel's* presence. Defendant cites no case suggesting that counsel must always attend a routine reading of earlier testimony to the jury, and our cases permit counsel discretion to waive his right to be present on such occasions. (See *People v. Lang, supra*, 49 Cal.3d at p. 1028; *People v. Bloyd, supra*, 43 Cal.3d at pp. 360-361.) No suggestion is made that actual prejudice occurred by reason of counsel's absence, such as a misreading of testimony or misconduct by the clerk, and such prejudice cannot be presumed on a silent record.

In this regard, the situation is different from that presented in *People v. Hogan* (1982) 31 Cal.3d 815, 848-850 [183 Cal.Rptr. 817, 647 P.2d 93], on which defendant relies. In *Hogan*, counsel was never informed of jury requests to see various exhibits and transcripts sent to the jurors during deliberations. Here, on the other hand, counsel was aware of the jury's request and was able to make an informed decision as to the necessity of attending the proceeding. We conclude no error occurred.

IV. Penalty Phase Contentions

A. *Victims' Character Evidence*

During the penalty phase, the prosecutor called relatives of the three robbery-murder victims to confirm that the victims were friendly, nonaggressive persons who would not have resisted a robbery attempt. For example, victim Martin's father and victim Metal's sister each testified that the respective victim had previously agreed not to resist any such attempt. The various family witnesses also identified recent "family" type photographs of the victims to show their appearance when defendant confronted them. Thereafter, in argument, the prosecutor used the photographs to argue that each victim was a "passive" type unlikely to resist a robbery. The prosecutor cautioned the jury not to use the photos to feel sympathy for the victims or their families.

The foregoing evidence was introduced to assist in establishing, as an additional aggravating circumstance of the crime (see § 190.3, factor (a)), that the nonresisting victims may have been executed without cause or provocation. The trial court ruled that evidence of the victims' likely nonresistance was relevant to show the "state of mind of these . . . victims as to what their attitude would be if they were to be robbed." As for the photos, the court explained that they had probative value to show "what these people look like and what [defendant] saw at the time of the killings."

Defendant argues that, despite the prosecutor's disclaimer, the "nonresistance" evidence was only marginally relevant to the penalty phase and constituted, in effect, victim impact or character evidence of the sort

ruled inadmissible by the United States Supreme Court. (See *South Carolina v. Gathers* (1989) 490 U.S. ___ [104 L.Ed.2d 876, 109 S.Ct. 2207]; *Booth v. Maryland* (1987) 482 U.S. 496 [96 L.Ed.2d 440, 107 S.Ct. 2529].) *Gathers* makes it clear that prosecutors may not exploit evidence regarding the victim's good character or background for purposes of gaining the jury's sympathy for the victim or his family. *Booth* precludes admission of evidence regarding the impact of the victim's death on his or her family. Both cases deemed the evidence at issue *irrelevant* to the sentencing decision and potentially prejudicial to the defendant's plea for a lesser punishment.

We recently encountered a similar contention in *People v. Carrera* (1989) 49 Cal.3d 291, 336 [261 Cal.Rptr. 348, 777 P.2d 121], where the victim's mother testified regarding her children's nonaggressive personalities. We first observed in *Carrera* that "*Booth* does not purport to bar generally the use of information about a murder victim at the penalty phase. The Supreme Court's concern lay mainly in the mandatory requirement that the entire victim-impact statement be admitted and in the risk that the jury's attention would be drawn to the personal qualities of the victim rather than to the blameworthiness of the defendant . . . . [T]he court took pains to note that '[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime' and that 'there may be times that the victim's personal characteristics are relevant to rebut an argument offered by the defendant.' [Citation.] *Booth* thus does not alter the standard for the admission of such evidence. (See also *South Carolina v. Gathers* [*supra*] 490 U.S. ___ [104 L.Ed.2d 876, 109 S.Ct. 2207].) The question thus remains

whether the testimony was relevant, and whether its probative value outweighed any prejudicial effect." (49 Cal.3d at p. 336.)

We concluded in *Carrera* that similar evidence of the victims' nonaggressive character was relevant to support the inference "that the victims in all likelihood did not resist the robbery and the violent, fatal attack. This in turn bore directly upon the *manner* in which defendant committed the murders, and was plainly a 'circumstance of the crime' to which fair comment could be directed." (49 Cal.3d at pp. 336-337.)

Under the principles set forth in *Carrera*, the trial court here did not err in admitting evidence of the victims' nonaggressive character traits. (See also *People v. Douglas, supra*, 50 Cal.3d 468, 536 ["In our view, neither *Booth* nor *Gathers* bars comments on the crime from the victims' perspective, or brief references to the victims or families. [Citations.]"].)

Carrera, supra, 49 Cal.3d 291, did not suggest, however, that family photographs would be relevant to establish the nonresisting character of the victims. Moreover, defendant points out that some family members additionally testified to such irrelevant matters as the victims' capacity for work, desire to save money or return to school, or vegetarian eating habits. Our review of the record indicates, however, that except for a few isolated references of this kind (to which no objection was made), the family members' testimony was essentially confined to the victims' probable nonresistance to being robbed.

Even if we were to conclude that the introduction of the photographs and family member testimony violated

the proscriptions of *Gathers* and *Booth*, we would find beyond a reasonable doubt that any such error did not contribute to the sentencing determination. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065].) In our view, the foregoing evidence could not have diverted the jury from its task of determining the appropriate punishment. (See *People v. Douglas, supra*, 50 Cal.3d at p. 537.)

B. *Evidence of Prior Unadjudicated Crimes*

The prosecutor introduced evidence of four prior unadjudicated crimes as aggravating circumstances relevant to sentencing. (§ 190.3, factor (b).) These crimes included another robbery-murder (victim Martin), two assaults and a rape. Defendant contends that introduction of such evidence denied him due process and equal protection, and resulted in an unreliable sentence. He acknowledges that we rejected similar arguments in *People v. Balderas* (1985) 41 Cal.3d 144, 204-205 [222 Cal.Rptr. 184, 711 P.2d 480] [maj. opn. by Grodin, J.], but he urges us to reconsider that ruling because of the "gross superficiality" of our analysis in that case.

We have had many opportunities to reconsider *Balderas* (*supra*, 41 Cal.3d 144), but have consistently, and without dissenting vote, declined to do so. See, e.g., *People v. Robertson, supra*, 48 Cal.3d 18, 42; *People v. Malone, supra*, 47 Cal.3d 1, 48; *People v. McDowell* (1988) 46 Cal.3d 551, 569 [250 Cal.Rptr. 530, 758 P.2d 1060]; *People v. Hamilton* (1988) 46 Cal.3d 123, 144 [249 Cal. Rptr. 320, 756 P.2d 1348], *People v. Grant, supra*, 45 Cal.3d 829, 859; *People v. Belmontes* (1988) 45 Cal.3d 744, 808 [248 Cal.Rptr. 126,

755 P.2d 310]; *People v. Dyer* (1988) 45 Cal.3d 26, 76 [246 Cal. Rptr. 209, 753 P.2d 1]; *People v. Gates* (1987) 43 Cal.3d 1168, 1202 [240 Cal.Rptr. 666, 743 P.2d 301].) Defendant, characterizing these cases as the "dubious progeny" of *Balderas*, and lacking in any "reasoned analysis," insists that new arguments exist to support reconsideration of that case. We disagree.

Defendant argues (1) the jury which found him guilty of the charged offenses could not be fair and unbiased in adjudging his guilt of other unadjudicated crimes at the penalty phase; (2) "other crimes" evidence is inherently prejudicial, diverting the penalty phase jury's attention from its proper task; (3) the jury cannot realistically be expected to ignore "other crimes" evidence not found true beyond a reasonable doubt; (4) some other state courts favor a rule contrary to *Balderas*; and (5) equal protection principles require treating all defendants equally, yet those who are separately prosecuted for the alleged aggravating circumstances are given rights (e.g., an impartial and unanimous jury) not available when "other crimes" evidence is merely "presented" to the penalty phase jury.

Contrary to defendant's assumption, we think *Balderas* and its progeny adequately considered and rejected the foregoing arguments. As *Balderas* observes, each of these contentions is overshadowed by the state's legitimate interest in prosecuting capital cases before a single jury, and in allowing that jury to weigh and consider the defendant's prior criminal conduct in determining penalty, so long as reasonable steps are taken to assure defendant a fair and impartial penalty trial. (See *People v.*

Balderas, supra, 41 Cal.3d at pp. 204-205.) We decline to reconsider that rationale here.

Defendant observes that criminal charges regarding his prior rape offense had been twice dismissed, thereby barring further prosecution (§ 1387). Defendant contends this bar likewise extended to use of the evidence as an aggravating circumstance.

In *People v. Heishman, supra,* 45 Cal.3d 147, 193, we explained that dismissal of charges is not the equivalent of an outright acquittal, because it is "not based on any judicial determination with respect to the truth or falsity of the charge. . . . " Similarly, we have held that evidence of offenses barred by the statute of limitations is nonetheless admissible as aggravating evidence at the penalty phase. (*People v. Robertson, supra,* 48 Cal.3d at pp. 43-44; *People v. Jennings* (1988) 46 Cal.3d 963, 981-982 [251 Cal.Rptr. 278, 760 P.2d 475].) The rationale of those cases applies here.

C. *Extreme Mental or Emotional Disturbance*

In accordance with section 190.3, factor (d), the jury was instructed to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (CALJIC former No. 8.84.1.) Defendant asserts that the foregoing instructions, by referring to an "extreme" condition, indicated that any "lesser disturbance" would not be a possible mitigating factor. He fears this instruction may have induced the jury to ignore the substantial evidence indicating he was suffering from some type of mental illness. We cannot agree.

First, it should be noted that the trial court also instructed the jury that it was to consider "any other circumstance which extenuates the gravity of the crime. . . . " (§ 190.3, factor (k); CALJIC former No. 8.84.1.) In *People v. Ghent, supra,* 43 Cal.3d 739, we concluded that this "'catchall' provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense." (*Id.* at p. 776.) In subsequent cases, we have reaffirmed our *Ghent* holding. (E.g., *People v. Hunter* (1989) 49 Cal.3d 957, 987-988 [264 Cal.Rptr. 367 782 P.2d 608]; *People v. Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal. Rptr. 55, 763 P.2d 906]; *People v. Caro* (1988) 46 Cal.3d 1035, 1064 [251 Cal.Rptr. 757, 761 P.2d 680]; *People v. Brown, supra,* 46 Cal.3d at pp. 457-458; *People v. Babbitt* (1988) 45 Cal.3d 660, 720-721 [248 Cal.Rptr. 69, 755 P.2d 253]; *People v. Lucky* (1988) 45 Cal.3d 259, 297 [247 Cal.Rptr. 1, 753 P.2d 1052].)

The trial court went even further, however, and modified the factor (k) instruction to include consideration of "any sympathetic or other aspect of the defendant's character or record that the defendant proffers as a basis for a sentence less than death." (See *People v. Easley* (1983) 34 Cal.3d 858, 876-878, & fn. 10 [196 Cal.Rptr. 309, 671 P.2d 813].) Moreover, the court instructed the jury that it should disregard any other conflicting instruction.

Although in closing argument the prosecutor asserted that defendant's mental state evidence did not disclose any "extreme" condition, he did not advise the jury that such evidence was wholly irrelevant to its penalty decision, and defense counsel confirmed that the

evidence could be deemed a mitigating circumstance under factor (k). We conclude that the jury was properly instructed in this regard.

D. *Defendant's Mental Condition and Age as Aggravating Factors*

The court gave the standard instructions setting forth the list of aggravating and mitigating factors. (CALJIC former No. 8.84.1.) Defendant asserts the instructions were inadequate in failing to explain that certain factors, including defendant's mental condition and age, must be deemed mitigating ones. He maintains the prosecutor improperly labelled defendant's sociopathic condition and age (41) as aggravating factors.

We have held the standard instructions adequate despite their failure to identify the aggravating of mitigating character of the various sentencing factors, because such matters "should be self-evident to any reasonable person within the context of each particular case." (*People v. Jackson* (1980) 28 Cal.3d 264, 316 [168 Cal. Rptr. 603, 618 P.2d 149]; see *People v. McLain* (1988) 46 Cal.3d 97, 118 [249 Cal.Rptr. 630, 757 P.2d 569].)

As for the prosecutor's remarks, no error or misconduct appears: At no time did the prosecutor argue that defendant's mental condition should be deemed an aggravating factor. Our review of the record indicates that, in context, the prosecutor was simply observing that defendant's sociopathic condition, and the resulting antisocial conduct, should not be deemed a mitigating factor. (See *People v. Fields, supra,* 35 Cal.3d 329, 369-370.) Although he did argue that defendant's age should be

deemed aggravating, that argument was interwoven with the theme that, unlike an extremely young or old person, defendant was a mature, experienced individual who made a "well-considered decision" to undertake the various crimes he committed. Such an argument is a legitimate one. (See *People v. Lucky, supra,* 45 Cal.3d at p. 302.

As *Lucky* observes, the statutory word "age" is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (45 Cal.3d at p. 302.) We decline defendant's invitation to reconsider *Lucky*. (See *People v. Douglas, supra,* 50 Cal.3d 468, 538-539; *People v. Caro, supra,* 46 Cal.3d at p. 1062; *People v. McLain, supra,* 46 Cal.3d at p. 11.)

E. *Lack of Findings*

Defendant next argues the 1978 death penalty law is unconstitutional for failure to require the jury to set forth written findings regarding the various aggravating factors it relied on in imposing death. We rejected this constitutional objection several years ago, and we discern no compelling reason for reconsidering our position now. (*People v. Frierson* (1979) 25 Cal.3d 142, 178-180 [158 Cal.Rptr. 281, 599 P.2d 587]; see *People v. Belmontes, supra,* 45 Cal.3d at p. 805; *People v. Gates, supra,* 43 Cal.3d at p. 1203; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777 [230 Cal.Rptr. 667, 726 P.2d 113]; *People v. Jackson, supra,* 28 Cal.3d at pp. 316-317.) The federal courts have likewise

declined to require such findings as a matter of constitutional law. (*Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, reversed and remanded on other grounds in *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871]; see *Hildwin v. Florida* (1989) 490 U.S. 638, ___ [104 L.Ed.2d 728, 731-732, 109 S.Ct. 2055] [6th Amend. does not require Florida's advisory jury to specify aggravating factors].)

Defendant, observing that other convicted felons are entitled to trial *court* findings specifying the aggravating facts which justify an increased sentence (see § 1170, subd. (c)), argues that the lack of *jury* findings in capital cases offends equal protection principles. But the defendants in these two situations are not similarly situated. Requiring the trial judge to specify his or her reasons for making an increased sentencing decision is hardly comparable to requiring 12 jurors to recite the aggravating facts which each of them believed justified a death penalty. The California death penalty law does impose on the trial court in a capital case, in ruling on the automatic motion to modify sentence (see § 190.4, subd. (e)), the obligation to specify its reasons. This section fully satisfies any legitimate equal protection demands.

F. *Unanimity as to Uncharged Offenses*

Defendant next contends the court erred in failing to instruct the jury that it must unanimously find any uncharged offenses occurred beyond a reasonable doubt, before those offenses could be deemed aggravating circumstances under section 190.3, factor (b). We rejected that argument in *People v. Ghent, supra,* 43 Cal.3d at pp.

773-774. (See also *People v. Johnson, supra,* 47 Cal.3d at p. 1250; *People v. Jennings, supra,* 46 Cal.3d at p. 988; *People v. Miranda* (1987) 44 Cal.3d 57, 90 [241] Cal.Rptr. 594, 744 P.2d 1127].)

Defendant urges we reconsider *Ghent, supra,* 43 Cal.3d 739. He relies on *Johnson v. Mississippi* (1988) 486 U.S. 578 [100 L.Ed.2d 575, 108 S.Ct. 1981], but that seems wholly inapposite. In *Johnson,* the penalty jury had considered a prior criminal offense *which was later set aside.* The court reversed the death judgment on the basis the jury may have relied on the invalid conviction. Nothing in *Johnson* indicated a requirement the jury unanimously agree that a particular offense was proved beyond a reasonable doubt.

As we stated in *Ghent,* "we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty." (43 Cal.3d at p. 774.)

G. *Constitutionality of Sentencing Law*

Defendant asserts various constitutional challenges to the California sentencing law and procedure; he acknowledges that our prior decisions have rejected all these challenges. (See *People v. Jennings, supra,* 46 Cal.3d at p. 992; *People v. Bonin* (1988) 46 Cal.3d 659, 698-704 [250 Cal.Rptr. 687, 758 P.2d 1217]; *People v. Miranda, supra,* 44 Cal.3d 57, 102-107; *People v. Rodriguez, supra,* 42 Cal.3d at pp. 777-779; *People v. Jackson, supra,* 28 Cal.3d at pp. 315-317; *People v. Frierson, supra,* 25 Cal.3d at pp. 172-188.)

Defendant states no compelling reasons which might induce us to reconsider these decisions. (See also *Boyde v. California* (1990) 494 U.S. ___ [108 L.Ed.2d 316, 110 S.Ct. 1190].)

H. *Trial Court Consideration of Victim Impact and Character Evidence*

After the jury rendered its verdict, and after the trial court denied defendant's automatic motion to modify the death verdict (§ 190.4, subd. (e)), but before formal sentencing, various relatives of the victims testified regarding personal characteristics of the victims, and expressed their wish that the death sentence be imposed.

For example, victim Ariza's mother testified that her son had been a "promising and decent young man," and a "college student working to help pay his way through college." She testified that his death caused her family "untold grief, pain and suffering," and she urged that the death penalty be imposed. Ariza's father likewise attested to his suffering over his son's death, which led to his alcoholism, drunk driving conviction, loss of family and job. Similar, though less dramatic, testimony was elicited from the relatives of victims Rea, Metal, and Martin. Before sentencing defendant, the trial court indicated it had "certainly considered" the foregoing testimony.

As we have previously noted herein in connection with a similar argument involving the jury's consideration of evidence regarding the victims' nonaggressive characters, recent decisions of the United States Supreme Court deem most "victim impact" and "victim character"

evidence irrelevant to the sentencing decision and potentially prejudicial to the defendant's plea for a lesser punishment. (See *South Carolina v. Gathers, supra,* 490 U.S. ___ [104 L.Ed.2d 876] [prosecutor's argument regarding victim's good character]; *Booth v. Maryland, supra,* 482 U.S. 496 [victim impact statements].)

Neither case involves the admissibility of victim impact or character evidence at a sentencing hearing by the trial court following the jury's verdict. (See *People v. Siripongs* (1988) 45 Cal.3d 548, 585-586, fn.12 [247 Cal.Rptr. 729, 754 P.2d 1306].) Thus, we have stated that "the Eighth Amendment considerations" expressed in *Booth/Gathers* "are not implicated" in a modification hearing under section 190.4. (*People v. Jennings, supra,* 46 Cal.3d at pp. 994-995; see *People v. Lang, supra,* 49 Cal.3d at pp. 1043-1044.) Nonetheless, as we explained in *Jennings,* that section does limit the court's consideration to the evidence that was available to the jury. (46 Cal.3d at p. 994.)

As previously noted, the trial court announced its denial of the modification motion *before* hearing the family member testimony discussed above. After announcing its ruling, but before formally sentencing defendant, the court then permitted the family members to speak. Although the court indicated it had "considered" the family member testimony, it then outlined the considerable aggravating factors and evidence that it deemed supportive of a death sentence. The family victim testimony was not mentioned.

A similar situation occurred in *Siripongs, supra,* where we observed that the victim impact evidence could not

have affected the trial court's ruling because the court had denied the motion before hearing the challenged testimony. (See *People v. Siripongs, supra,* 45 Cal.3d at pp. 585-586, fn. 12; see also *People v. Lang, supra,* 49 Cal.3d at p. 1044 [trial court's consideration of victim impact evidence did not affect ruling denying modification]; *People v. Adcox, supra,* 47 Cal.3d at p. 274 [same]; *People v. Jennings, supra,* 46 Cal.3d at p. 995 [same].)

As we observed in *Lang, supra,* 49 Cal.3d 991, although the trial court did state it had read and "considered" a presentence report containing the victim impact evidence, the court in ruling on the motion referred only to the evidence presented to the jury and did not indicate his decision was influenced by that report or its contents.

The situation presented here and in *Lang* is quite different from that in *People v. Lewis* (1990) 50 Cal.3d 262, 287 [266 Cal.Rptr. 834, 786 P.2d 892], where the trial court in denying the automatic motion for modification of sentence expressly stated it was relying on facts found in an inadmissible probation report. In *Lewis,* the opinion orders a limited remand for another modification hearing. We conclude that under the circumstances in the present case, no such remand is required.

I. *Proportionality Review*

Defendant asserts that we should undertake a comparative "intercase" sentence review to assure that his death sentence is not disproportionate in light of the underlying facts. We have uniformly declined to undertake such review and see no reason to reconsider our holdings. (See, e.g., *People v. Lang, supra,* 49 Cal.3d at p.

1045; *People v. Burton* (1989) 48 Cal.3d 843, 873 [258 Cal.Rptr. 184, 771 P.2d 1270]; *People v. Johnson, supra,* 47 Cal.3d at p. 1253.)

V. Conclusion

The judgment is affirmed in its entirety.

Panelli, J., Eagleson, J., Kennard, J., and Arabian, J., concurred.

MOSK, J. – I dissent.

Defendant contends that the judgment must be reversed: the jury's determination that he was mentally competent cannot stand without offense to the due process clause of the Fourteenth Amendment to the United States Constitution. The majority reject the claim. After review, I am of the opinion that their analysis is erroneous and their conclusion unsound.

Prior to trial, on defense counsel's motion the court declared a doubt about defendant's mental competence and instituted proceedings on the question under the authority of the statutory scheme codified in Penal Code section 1367 and following. One of the provisions of that scheme is Penal Code section 1369, subdivision (f) (hereafter section 1369 (f)), which allocates the burden of proof to the defendant: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." The parties introduced substantial, but sharply conflicting, evidence on the issue. The jury was instructed in accordance with section 1369(f). It

subsequently returned a verdict finding defendant mentally competent.

The statutory scheme on mental competence is fundamentally flawed in its allocation of the burden of proof to the defendant, and therefore cannot support the verdict returned under its "authority."

The due process clause prohibits the conviction of a person for a crime if he does not satisfy all the elements of the offense. (See e.g., *Mullaney v. Wilbur* (1975) 421 U.S. 684, 691-704 [44 L.Ed.2d 508, 514-523, 95 S.Ct. 1881].) Further, it bars conviction except on proof beyond a reasonable doubt by the prosecution of each of the elements. (E.g., *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375, 90 S.Ct. 1068].)

Similarly, the due process clause prohibits the conviction of a person for a crime if he is not mentally competent. (See, e.g., *Pate v. Robinson* (1966) 383, U.S. 375, 378 [15 L.Ed.2d 815, 818, 86 S.Ct. 836].) By parity of reasoning, it bars conviction except on proof beyond a reasonable doubt by the prosecution that the defendant is in fact mentally competent.

To be sure, the due process clause does not require the prosecution to prove the defendant sane beyond a reasonable doubt. (*Mullaney v. Wilbur, supra,* 421 U.S. at pp. 705-706 [44 L.Ed.2d at pp. 523-524] (conc. opn. of Rehnquist, J.) [discussing *In re Winship, supra,* 397 U.S. 358 and *Leland v. Oregon* (1952) 343 U.S. 790 (96 L.Ed. 1302, 72 S.Ct. 1002)].) But an insanity defense is apparently not constitutionally mandated. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 91 [84 L.Ed.2d 53, 71, 105 S.Ct. 1087] (dis. opn. of Rehnquist, J.) [stating that "[i]t is highly

doubtful that due process requires a State to make available an insanity defense to a criminal defendant"].) Further, it is an affirmative defense and as such comes into play only after the prosecution has proved the existence of all the elements of the crime charged beyond a reasonable doubt. (See *Mullaney v. Wilbur, supra,* 421 U.S. at pp. 705-706 [44 L.Ed.2d at pp. 523-524] (conc. opn. of Rehnquist, J.).)

The foregoing analysis, however, does not affect the conclusion that the due process clause does indeed require the prosecution to prove the defendant mentally competent beyond a reasonable doubt. Mental competence *is* in fact constitutionally mandated. Further, mental incompetence is *not* an affirmative defense that becomes operative only after proof of the crime at trial. "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him to consult with counsel, and to assist in preparing his defense may not be subjected to trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 171 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896].)

Therefore, the statutory scheme for proceedings on mental competence is fundamentally flawed in its allocation of the burden of proof to the defendant, and as a result cannot support the verdict returned under its "authority" in this case.[1]

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[1] For purposes here, I need not and do not consider the separate question of the constitutionally proper allocation of the burden *of producing evidence.* (See generally 2 ABA standards for Criminal Justice, std. 7-4 .38 (2d ed. 1986) p. 7 . 3208; *id.* Commentary, pp. 7. 213-7 .3215.)

Accordingly, I would reverse the judgment in its entirety.

BROUSSARD, J. – I respectfully dissent.

As the majority opinion recognizes, this case presents a significant constitutional issue that has not yet been resolved by this court or by the United States Supreme Court and that has divided the lower federal courts and other state courts. The question is: When a doubt has arisen with respect to a criminal defendant's competency to stand trial, is it constitutionally permissible for a state to apply a procedural rule that presumes the defendant is competent and that places on the defendant the burden of proving that he is incompetent? (See Pen. Code, § 1369, subd. (f).)[1]

I disagree with the majority's conclusion that the challenged procedural rule is constitutional. Although the majority accurately note that "[t]he cases from other

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[1] Penal Code section 1369 provides in relevant part: "A trial by court or jury of the question of mental competence shall proceed in the following order. . . . [¶] (f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous."

Pursuant to this provision, the competency jury in the present case was instructed that "[t]he defendant is presumed to be mentally competent and he has the burden of proving by a preponderance of the evidence that he is mentally incompetent as a result of mental disorder or developmental disability."

state and federal jurisdictions are in conflict on the constitutional propriety of placing on the defendant the burden of proving his own incompetence" (see maj. opn., *ante*, p. 882), the opinion fails to point out that the overwhelming majority of decisions, both federal and state, that have addressed the issue have held that in a competency proceeding it is the prosecution, rather than the defendant, that must properly bear the burden of proof on the competency issue. (See, e.g., *United States v. DiGilio* (3d Cir. 1976) 538 F.2d 972, 986-989; *United States* ex rel. *Bilyew v. Franzen* (7th Cir. 1982) 686 F.2d 1238, 1244-1245; *Brown v. Warden, Great Meadow Correctional Facility* (2d Cir. 1982) 682 F.2d 348, 351-354; *United States v. Makris* (5th Cir. 1976) 535 F.2d 899, 905-906; *People v. McCullum* (1977) 66 Ill.2d 306 [362 N.E.2d 307, 310-311]; *State v. Jones* (S.D. 1987) 406 N.W.2d 366, 367-370; *State v. Bertrand* (1983) 123 N.H. 719 [465 A.2d 912, 916-917]; *Diaz v. State* (Del. 1986) 508 A.2d 861, 863-864; *State v. Heger* (N.D. 1982) 326 N.W.2d 855, 857-858; *Commonwealth v. Crowley* 1984) 393 Mass. 393 [471 N.E.2d 353, 357-358]; *Jolley v. State* (1978) 282 Md. 353 [384 A.2d 91, 98]; *contra Lowenfield v. Phelps* (5th Cir. 1987) 817 F.2d 285, 294-295, affd. on other grounds (1988) 484 U.S. 231 [98 L.Ed.2d 568, 108 S.Ct. 546]; *State v. Chapman* (1986) 104 N.M. 324 [721 P.2d 392, 395]; *State v. Pruitt* (1984) 18 Ohio.App.3d 50 [480 N.E.2d 499, 509] (separate conc. opns. of Markus, J., and Nahra, J.); *Wallace v. State* (1981) 248 Ga. 255 [282 S.E.2d 325, 330]; *State v. Aumann* (Iowa 1978) 265 N.W.2d 316, 319-320.) While not all of the cases in the majority line are explicitly based on constitutional principles, a substantial number of the decisions clearly rest on a constitutional foundation. (See *DiGilio, supra*, 538 F.2d at p. 988; *Bilyew, supra*, 686 F.2d at pp. 1244-1245; *McCullum, supra* 362 N.E.2d at pp. 310-311; *Jones, supra*, 406 N.W.2d at pp. 369-370; *Bertrand, supra*, 465 A.2d at p. 916.) Thus, the majority, in sustaining the constitutional validity of a statutory provision that requires a defendant to bear the burden of proving his own incompetency, have chosen to align our court with the minority of courts that have addressed the issue.

I acknowledge, of course, that our resolution of the constitutional question cannot properly be based on a head count of what other courts have done, but must rest on our own considered evaluation of the merits of defendant's constitutional claim. When the substance of the constitutional considerations underlying the out-of-state authorities is carefully analyzed, however, in my view it is clear that the opinion's conclusion cannot be sustained.

As the majority opinion recognizes, the constitutional analysis must begin with the United States Supreme Court decisions in *Pate v. Robinson* (1966) 383 U.S. 375 [15 L.Ed.2d 815, 822, 86 S.Ct. 836] and *Drope v. Missouri* (1975) 420 U.S. 162 [43 L.Ed.2d 103, 112-113, 95 S.Ct. 896]. In *Pate* and *Drope*, the United States Supreme Court established that the federal due process clause not only prohibits a state from convicting a defendant who is not legally competent to stand trial, but also requires a state to adopt and to apply procedures that are fully adequate to protect this constitutional right. (See *Pate, supra*, 383 U.S. at p. 378 [15 L.Ed.2d at p. 818]; *Drope, supra*, 420 U.S. at pp. 171-172 [43 L.Ed.2d at pp. 112-113].) The question before us is whether a state procedure that places the burden of proof at the competency hearing on the defendant properly protects this crucial right.

In *United States v. DiGilio, supra,* 538 F.2d 972 (hereafter *DiGilio*), the Third Circuit identified two distinct considerations that render a rule placing the burden of proof of incompetency on a defendant constitutionally impermissible. The first consideration is the basic unfairness of placing the burden of proof on a defendant whose incompetence, if actually present, will impair his ability to adequately assist in the task of meeting his burden of proof. With respect to this point, the *DiGilio* court noted that in *Pate v. Robinson, supra,* 383 U.S. 375, the United States Supreme Court had rejected the notion that a defendant, as to whom a question of incompetency had arisen, could waive his right to have his competency determined prior to trial. The Supreme Court reasoned in *Pate* that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." (*Pate, supra,* 383 U.S. at p. 384 [15 L.Ed.2d at p. 821].) The *DiGilio* court explained that "[i]t is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." (*DiGilio, supra,* 538 F.2d at p. 988.)

The second consideration emphasized by the *DiGilio* court is that a rule that places the burden of proof on the defendant means that when the evidence on the competency issue is equally balanced, the trier of fact must resolve the issue in favor of competency, thereby subjecting a defendant to a criminal proceeding in which he faces serious sanctions even when the defendant is as likely to be incompetent as competent. As the *DiGilio*

court put it: "[W]hat we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the [Supreme] Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, see *Drope v. Missouri, supra,* 420 U.S. at 171-172, 95 S.Ct. 896, the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant." (*DiGilio, supra,* 538 F.2d at p. 988, fn. omitted.)

In rejecting defendant's constitutional claim in the present case, the majority opinion relies almost entirely on the fact that the United States Supreme Court, in *Leland v. Oregon* (1952) 343 U.S. 790, 798-799 [96 L.Ed. 1302, 1308-1309, 72 S.Ct. 1002] (hereafter *Leland*) and *Rivera v. Delaware* (1976) 429 U.S. 877 [50 L.Ed.2d 160, 97 S.Ct.226] (hereafter *Rivera*), has held that it is not unconstitutional for a state to impose on a defendant the burden of proof with respect to an insanity defense. Like the minority line of decisions it follows, however, the majority opinion fails to recognize that the *Leland* and *Rivera* decisions have no bearing whatsoever on either of the two constitutional problems identified in *DiGilio, supra,* 538 F.2d 972.

To begin with, the competency issue and the insanity issue deal with a defendant's mental state at two entirely different points in time. As one commentator has explained: "[T]he issue of incompetency to stand trial must be distinguished from . . . the defense of insanity in

a criminal trial, where the question is whether the defendant's mental condition *at the time of the criminal act* was such that he should not be held responsible for his conduct. The question of competency to stand trial relates rather to the appropriateness of conducting the criminal proceeding in light of the defendant's *present* inability to participate effectively." (Note, *Incompetency to Stand Trial* (1967) 81 Harv.L.Rev. 454, italics added.)

In the insanity context, a rule placing the burden of proof of insanity on the defendant imposes that burden on a defendant who, by necessity, must have already been found to be presently competent to assist in his own defense. When a defendant is presently competent, there may be no greater unfairness in placing the burden on the defendant to prove that he was insane at the time of the offense than there is in requiring such a defendant to bear the burden of proof with regard to other affirmative defenses.

In the competency context, by contrast, the defendant's present ability to understand the proceeding and assist his counsel is the very matter in doubt, raising the fundamental problem of the potential unfairness of a rule that requires an incompetent defendant to shoulder the burden of proof on the crucial question of competency. Thus, the Supreme Court's decisions in *Leland, supra* 343 U.S. 790, and *Rivera, supra*, 429 U.S. 877, holding that it is constitutionally permissible to place on a presently competent defendant the burden of establishing an insanity defense, provide no logical or legal support for the proposition that it is constitutionally permissible to place the burden of proof on a defendant who may be presently incompetent to assist his counsel in meeting that burden.

Furthermore, *Leland, supra*, 343 U.S. 790, and *Rivera, supra*, 429 U.S. 877, are equally unresponsive to the second constitutional concern identified in *DiGilio, supra*, 538 F.2d 972, 988, namely, that a rule placing the burden of proof of competency on the defendant violates due process because it creates too great a risk of an unreliable competency determination by permitting a defendant to be found competent and subjected to trial even when the evidence of competence does not outweigh the evidence of incompetence.

In *Leland, supra*, 343 U.S. 790, and *Rivera, supra*, 429 U.S. 877, the burden of proof question arose in the context of the proper allocation of burdens of proof between the prosecution and the defense with regard to the elements of an offense, on the one hand, and affirmative defenses, on the other. In *Leland* and *Rivera*, and in the more recent decision in *Martin v. Ohio* (1987) 480 U.S. 228 [94 L.Ed.2d 267, 107 S.Ct. 1098], the United States Supreme Court reaffirmed the constitutionality of the general common law rule placing the burden of proving an affirmative defense on the defendant. These cases simply hold that so long as the prosecution is required to meet its burden of proving all the elements of a criminal offense beyond a reasonable doubt, the Constitution does not preclude a state from placing on the defendant the burden of proving an affirmative defense.

In the present case, unlike *Leland, supra*, 343 U.S. 790, *Rivera, supra*, 429 U.S. 877, or *Martin v. Ohio, supra*, 480 U.S. 228, the burden of proof question does not involve a matter of allocating burdens with respect to an element of an offense or an affirmative defense. While it is true, as the opinion observes, that a "defendant's competence to

stand trial . . . is no more an element of the crime charged than is his sanity" (see maj. opn. *ante*, p. 884), it is equally clear that the question of a defendant's competency to stand trial is not an affirmative defense. Unlike an affirmative defense, the competency issue is not one that a defendant may raise or decline to raise at his own option. Once a question as to the defendant's competency has arisen, the controlling Supreme Court decisions establish that, as a constitutional matter, the trial court must hold a hearing on the question even if the defendant objects and wishes to proceed without such a hearing, and the trial of the defendant cannot go forward unless it is properly determined that defendant is competent to stand trial. (See, e.g., *Pate v. Robinson, supra*, 383 U.S. 375, 384 [15 L.Ed.2d 815, 821]; *People v. Marks* (1988) 45 Cal.3d 1335, 1340 [248 Cal.Rptr. 874, 756 P.2d 260].)

Contrary to the implicit suggestion of the majority opinion, the fact that defendant's competence is not an element of an offense does *not* mean that it is constitutionally permissible to place the burden of proof of that issue on the defendant rather than on the prosecution.[2]

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[2] Because a defendant's competency to stand trial is not an element of a criminal offense, most decisions have held that it is constitutionally permissible for a state to require the prosecution to prove competence only by a preponderance of the evidence, rather than beyond a reasonable doubt. (See, e.g., *DiGilio, supra*, 538 F.2d 972, 988.) Nonetheless, as explained above, the great majority of decisions have held that the prosecution, rather than the defendant must bear the burden of proof on this matter.

There are numerous matters that are not elements of a criminal offense on which the prosecution, rather than the defendant, bears the burden of proof. For example, although the voluntariness or involuntariness of a confession is not an element of a crime, the Constitution requires that the prosecution, rather than the defense, bear the burden of proving voluntariness by a preponderance of the evidence. (*Leo v. Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2d 618, 627-628, 92 S.Ct. 619].)[3] Similarly, although the statute of limitations is not an element of a crime, the prosecution, rather than the defense, bears the burden of proving by a preponderance of the evidence that the alleged crime was committed within the applicable limitations period. (See, e.g., *People v. Zamora* (1976) 18 Cal.3d 538, 565, fns. 26, 27 [134 Cal.Rptr. 784, 557 P.2d 75]. See generally 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 372, p. 426.)

Although the Supreme Court has not yet expressly resolved the question whether a state may properly impose the burden of proof on the competency issue on the defendant rather than on the prosecution, its past rulings on the competency question are inconsistent with a rule placing the burden of proving incompetency on the defendant. As noted above, in *Pate v. Robinson, supra*, 383 U.S. 375, the court expressly rejected the notion that a

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[3] In *Twomey*, the court stated: "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." (*Twomey, supra*, 404 U.S. 477, 489 [30 L.Ed.2d 618, 627].)

defendant whose competency is in question may "waive" the incompetency issue, holding that once a question as to a defendant's competency to stand trial has arisen, the trial court has a constitutional obligation to ensure that the trial does not go forward until it is properly determined that the defendant is competent to stand trial. (See also *Drope v. Missouri, supra,* 420 U.S. 162, 181 [43 L.Ed.2d 103, 118-119].) If the competency of the defendant is so vital and fundamental to a fair trial that neither a defendant nor his counsel may waive the point or consent to a trial without a proper determination of the issue, it is clearly impermissible for a state to permit a defendant to be found competent to stand trial simply on the basis of the defendant's own failure to prove incompetency rather than on the basis of affirmative proof demonstrating that the defendant is competent. (See Pizzi, *Competency to Stand Trial in Federal Courts:Conceptual and Constitutional Problems* (1977) 45 U.Chi.L.Rev. 21, 57.) As the *DiGilio* court put it, in light of the Supreme Court's emphasis of the fundamental importance of a competent defendant to the basic fairness of the entire trial process, "[e]vidence showing competency must be more persuasive than that showing incompetency" before a defendant may properly be found competent to stand trial. (*DiGilio, supra,* 538, F2d 972, 988.)

To put the matter in slightly different terms, the challenged California procedure is unconstitutional because it places too great a risk on the defendant of an erroneous determination of competency. As a number of United States Supreme Court decisions explain, procedural rules assigning the burden of proof on particular issues, or establishing the appropriate standard of proof

applicable to a given issue, reflect "a societal judgment about how the risk of error should be distributed between the litigants." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [71 L.Ed.2d 599, 607, 102 S.Ct. 1388]; see, e.g., *Addington v. Texas* (1979) 441 U.S. 418, 423-425 [60 L.Ed.2d 323, 329-331, 99 S.Ct. 1804]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 700-701 [44 L.Ed.2d 508, 514-523, 95 S.Ct. 1881].) In *Speiser v. Randall* (1958) 357 U.S. 513 [2 L.Ed.2d 1460, 78 S.Ct. 1332], a civil case the court explained the practical consequences and policy considerations implicit in the assignment of the burden of proof. The *Speiser* court stated: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. [Citations.] There is always in litigation a margin of error, representing error in factfinding. . . . *Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance,* and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. *Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence* and convincing the factfinder of his guilt." (357 U.S. at p. 525 [2L.Ed. 2d at pp. 1472-1473], italics added.) In a competency proceeding, the risk of an erroneous determination of competency can be properly contained within permissible constitutional limits only if the prosecution is required to bear the burden of proving, by at least a preponderance of the evidence, that the defendant is competent to stand trial.

In sum, the majority opinion's reliance on the *Leland, supra,* 343 U.S. 790, and *Rivera, supra,* 429 U.S. 877, decisions is totally misplaced. Those cases simply have no bearing on the distinct constitutional problems posed by a state procedure that places the burden of proof in a competency proceeding on the defendant.

In addition to its reliance on *Leland, supra,* 343 U.S. 790, and *Rivera, supra,* 429 U.S. 877, the opinion suggests that "sound practical and policy considerations" support a rule placing the burden of proving incompetency on the defendant because the defendant and his counsel can be expected to have better access than the People to the facts relevant to competency inquiry. (See maj. opn. *ante,* p. 885.) While the question of access to the facts of incompetency is a relevant consideration which may well justify placing the initial *burden of production,* i.e., the burden of going forward with evidence, on the defendant, it cannot justify a rule of law placing *the burden of proof* on the defendant, a rule of law that as just explained permits the trier of fact to find the defendant, competent even when the evidence of competence does not outweigh the evidence of incompetence.[4] Furthermore, to the extent that

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[4] The "model provision" on competency procedures set forth in the American Bar Association Standards for Criminal Justice speaks directly to this point. Standard 7-4.8, subdivision (c)provides in this regard: "At the [competency] hearing . . . [¶] (i) The party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence. If the defendant has moved for evaluation then the defense should have the burden of going forward; if the prosecutor or the court on its own motion or on information

(Continued on following page)

the majority's argument purports to suggest that a rule placing the burden of proving competency on the prosecution is "impractical" in light of the realities of the incompetency inquiry, the opinion's conclusion cannot be squared with the fact that both the federal courts and the great majority of state courts have long operated under a procedure in which the prosecution bears the burden of proof on the competency issue.

Thus, I conclude that the opinion is in error in upholding the constitutionality of Penal Code section 1369, subdivision (f) insofar as the provision establishes a presumption that a defendant is competent to stand trial and places the burden on the defendant to prove his incompetency. I agree with defendant that the trial court committed constitutional error in instructing the jury pursuant to this provision.

Finally, under the facts of this case, the error cannot properly be found harmless under the applicable standard for federal constitutional error. (See, e.g., *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065].) At the competency hearing in this matter, conflicting testimony was introduced as to defendant's competency to stand trial. Although a

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supplied by the prosecutor has raised the issue, then the prosecutor should have the burden of going forward. [¶] (ii) If the court, after hearing the evidence, finds by the greater weight of the evidence that the defendant is competent to stand trial the matter should proceed to trial; if not, the court should proceed to issues of treatment or habilitation to effect competence." (2 ABA Standards for Criminal Justice, std. 7-4.8 (2d ed. 1986) p. 7.208 See also *id.*, com. to std. 7-4.8, pp. 7.213 to 7.215.)

number of prosecution experts testified that, in their opinion, defendant was competent to stand trial, the psychiatrist who had the longest relationship with defendant testified that, in his view, defendant was not presently competent to stand trial. In addition, a defense investigator testified as to defendant's repeated refusal to discuss any substantive aspect of the case with him.

Furthermore, in his closing argument to the jury at the competency phase, the prosecutor made a point of emphasizing that the defendant bore the burden of proving his own incompetency. The prosecutor told the jury in this regard: "So the question is, has the defense proven that this defendant is mentally incompetent to stand trial. It's the defense burden. [¶] It's not like the regular criminal case that you have where we have the burden of proving someone guilty beyond a reasonable doubt. We don't have that burden here. [¶] It's the defense burden. The law put that burden on the defendant because otherwise you would have every defendant saying – when it's a tough case against him, every defendant would be coming in and saying, I can't cooperate with my attorney, I can't understand the charges. And you wouldn't have any trials occurring. So the law has made it tough on the defendant to try to prove that."

Under these circumstances, the constitutional error in instructing the jury that defendant bore the burden of proof on the competency issue cannot be found harmless beyond a reasonable doubt.

Accordingly, in light of the prejudicial constitutional error at the competency phase, I conclude that the

judgment should be reversed in its entirety. (See, e.g., *People v. Marks, supra*, 45 Cal.3d 1335; *People v. Hale* (1988) 44 Cal.3d 531 [244 Cal.Rptr. 114, 749 P.2d 769].)

ORDER DENYING REHEARING

Crim 26161 No. S004758

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

TEOFILO MEDINA, JR.,
Appellant

Appellant's petition for rehearing DENIED.

Most, J. and Broussard, J. are of the opinion the petition should be granted.

Dated February 11, 1991.

/s/ (illegible)
Chief Justice

Supreme Court of the United States

No. 90-8370

Teofilo Medina, Jr.,

Petitioner

v.

California

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of California.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 21, 1991

Supreme Court, U.S.
FILED
DEC 6 1991
OFFICE OF THE CLERK

No. 90-8370

In The

Supreme Court of the United States

October Term, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court of California

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QUESTION PRESENTED

After a doubt has been declared by a trial court as to the competence of a criminal defendant to stand trial, may a state, consistent with the due process clause of the Fourteenth Amendment, impose the burden of proof of incompetency upon the defendant whose competency is in issue, and impose an evidentiary presumption of competency in addition to imposing the burden of proof on the defendant, when: (1) the defendant's interest in not being tried while incompetent is fundamental; (2) the risk of an erroneous deprivation of the defendant's right, as a result of the placement of the burden of proof, is high, and is highest in situations where resolution of the question of the defendant's competence is medically difficult; (3) the placement on the state of the burden of proof as to the defendant's competence would entail no costs, or minimal additional costs, to the state; and (4) the defendant is treated, under state law, as incompetent during the proceedings to determine competence.

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Petitioner TEOFILO MEDINA, JR., respectfully prays that this Court reverse the judgment of the Supreme Court of California affirming his conviction and sentence of death.[1]

OPINIONS BELOW

The opinion of the California Supreme Court is published as *People v. Medina*, 51 Cal.3d 870 (1990). JA 89. The order denying petitioner's timely petition for rehearing is unpublished. JA 164.

JURISDICTION

The judgment of the Supreme Court of California, affirming petitioner's conviction and sentence, was entered on November 19, 1990. A timely petition for rehearing was denied on February 14, 1991. On motion of petitioner, Justice O'Connor entered an order on May 6, 1991, extending the time for the filing of a petition for certiorari until June 14, 1991, and on June 14, 1991, the petition for certiorari was filed. This Court granted the petition on October 21, 1991, limited to one issue presented in the petition. JA 165. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

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[1] There are no parties to this proceeding other than those stated in the caption.

person within its jurisdiction the equal protection of the laws."

California Penal Code section 1369 provides, in pertinent part:

> "A trial by court or jury of the question of mental competence shall proceed in the following order:
>
> * * *
>
> "(f) In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous."

STATEMENT OF THE CASE

Petitioner Medina was charged with committing three murders with special circumstances, Cal. Pen. Code, §§ 187, 190.2, subd. (a)(17)(i and vii), (a)(3), and with other offenses. CT 1.[2] Before trial, on motion of the defense and without objection from the prosecution, the trial court declared a doubt as to the defendant's competence to stand trial, suspended the criminal proceedings, and instituted proceedings under California Penal Code section 1368 to try the issue of competence to a jury. CT 419.

Petitioner Medina had been examined by Drs. Gold, Pierce, Sharma, and Sakurai, and Mr. Miller, a mental health specialist, and all had different opinions of the degree and character of his mental impairment. Dr. Gold,

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[2] CT and RT refer to the clerk's and reporter's transcripts in the automatic appeal in the California Supreme Court, and JA refers to the Joint Appendix.

who was then Chief Psychiatric Consultant to the Arizona Department of Corrections, had treated Medina for over a year at the Arizona State Prison, from 1977 to 1979. During that time, Dr. Gold saw Medina every one or two weeks, and he examined Medina again just before the competency hearing. JA 26-28.

Dr. Gold diagnosed Medina as a chronic paranoid schizophrenic. He was not competent because he was not aware of the charges against him, and he suffered from psychotic denial: in that condition events other than those which the patient obsessively focuses on simply do not exist. JA 22, 27-29, 30. "Schizophrenics have a very active fantasy life and at times when they are psychotic, it is difficult to differentiate between what is fantasy and what is real. . . . [t]his is just part of the jungle that they live in. It is their day-to-day life." JA 24. Dr. Gold considered Medina's history of self-mutilation consistent with his schizophrenia, since an imprisoned schizophrenic will vent his "anger and rage" upon himself: "He becomes his own target." JA 25-26. Schizophrenia normally does not go into remission without medication and treatment, and Medina's condition was not in remission. JA 24-25.

Dr. Gold believed that a desire on an inmate's part for a change of housing, or manipulative behavior, does not necessarily suggest malingering, since on some subjects schizophrenics can plan and act rationally. JA 35-36. Medina's escape attempt in Arizona was also consistent with paranoid schizophrenia, since confined individuals with that condition "feel justified in obtaining their freedom. They are being held illegally to begin with." JA 35.

Dr. David Pierce, a psychologist appointed by the court, interviewed Medina six times and performed some testing in the jail. He also diagnosed Medina as paranoid schizophrenic. JA 61, 71. The results of the testing were similar to those of paranoid schizophrenics, and some responses were associated with aggression and hostility. Dr. Pierce believed that Medina had problems with memory (one of his tests scored him in the lowest 5% of the population on "logical memory"), but that this was not

indicative of malingering since Medina failed to remember things when there was no gain in not remembering. JA 63-64; RT 603-605. Dr. Pierce did not think Medina was malingering or being deliberately uncooperative, JA 53-55, and the manner of his inattentiveness at times suggested that he was hallucinating. JA 62. Medina's history included reports that he heard voices, including that of his dead brother, and that he had seen Christ and St. John. JA 70.

Dr. Pierce nevertheless believed Medina was competent, because he understood the charges and the "roles" of people in the courtroom. JA 72-73. He believed Medina would cooperate with his lawyers "to the extent that he is able" JA 68, although he did not explain how Medina's failures of memory and delusions were consistent with his rational participation in his defense. Dr. Pierce believed that most schizophrenics were competent to stand trial. JA 68-69.

Dr. David Echeandia, an Orange County jail psychologist, had talked to Medina five or six times in the course of his work at the jail. He thought Medina was a "puzzle diagnostically", showing signs suggestive of schizophrenia, of schizotypal personality disorder, and of depression. JA 42. Dr. Echeandia's current diagnosis was of borderline personality disorder with some antisocial features, but schizophrenia remained a possible diagnosis. JA 43, 46. Medina's condition was not primarily psychotic, but Dr. Echeandia observed periods in which Medina's behavior suggested "impairment of reality testing," when he would be doing something "suggestive of a loss of contact with reality." JA 17. He was sometimes agitated, disoriented and confused, had memory problems, and was uncommunicative, in addition to being "very unstable" violent, aggressive and manipulative, JA 19-20, but Dr. Echeandia did not think malingering could account for all of Medina's symptoms. JA 43. Medina had told him that he was afraid of being killed in jail, and that

he had heard his dead mother's voice. He had not examined Medina on the issue of competence and did not have an opinion on the issue. JA 44.

Dr. Kaushal Sharma, a psychiatrist appointed by the court to examine Medina, believed that he had some mental impairment. JA 55. He believed that Medina was malingering, however, and that he was able to cooperate with his attorneys if he chose to, although he conceded that it was possible Medina had no control over his failure to cooperate. JA 50, 53-54. Dr. Sharma agreed with one of the doctors who treated Medina in Arizona, who diagnosed him as paranoid schizophrenic, but in remission, and thought that Dr. Gold's observations were consistent with the condition being in remission. JA 51.

Dr. Sharma saw Medina once or twice in 1985, before he was stabbed in the jail, and once in 1986, shortly before the competency proceeding. In the latter interview, Medina was uncooperative, saying that he was "paranoid" and could not talk to Dr. Sharma. After about twenty minutes, Medina lunged at, and cracked, the glass separating them in the interview booth. JA 52; RT 510-511.

Dr. Sharma believed that Medina's insistence on his "paranoia" was inconsistent with true pathology, but he conceded that Medina could have been using the term in the lay sense to indicate fear as a result of his near-fatal stabbing. He also acknowledged that Medina's references to the existence of his mental illness could have been influenced by the fact that he was being medicated by the jail mental health professionals for mental illness. JA 52-53. Despite Medina's uncooperativeness, Dr. Sharma still felt able to make a diagnosis, although he agreed that Dr. Gold, who had treated Medina over a long period of time, would be in a better position to do so. JA 48-49, 55.

Robert Miller was a mental health specialist with an undergraduate degree who had done some graduate work in psychology, and who worked for the Orange

County Jail. JA 56-57. He made an initial working diagnosis of Medina as suffering from paranoid schizophrenia, or possible bipolar disorder with psychotic features, based on a forty-minute interview and some psychiatric history information, including a history of receiving psychiatric medication in Vacaville in 1972 and in the Arizona State Prison. JA 57-58. Miller later changed his opinion, after receiving uncorroborated information from an unidentified source in Arizona that Medina had not received medications or psychiatric treatment, and after observation of Medina's behavior for two to three weeks, to a diagnosis of antisocial personality disorder and malingering. JA 57-60.

Dr. George Sakurai, the Orange County jail psychiatrist, had seen Medina approximately eight or ten times in the course of his duties in the jail. He did not form an opinion about Medina's competence, since he had never examined him for that purpose. He did not think his rational discussions with Medina on other subjects necessarily implied he was competent. JA 9. Dr. Sakurai thought Medina's main problem was depression, and Medina was being given anti-depressant medication. JA 9-10; RT 231. He did not think Medina was psychotic or schizophrenic but he did think he was malingering. Dr. Sakurai testified that he did not think Medina's suicide attempts were faked, although he did not know whether Medina actually intended to kill himself; later Dr. Sakurai testified that he thought some of Medina's self-inflicted wounds were attempts at manipulation, as were his "outbursts" in jail. RT 750.

The testimony of lay witnesses was similarly diverse. David Sandberg, the defense investigator, talked to Medina in jail more than twenty times since taking the case in 1984 but Medina had never been able to have a conversation with him relevant to the charged offenses. JA 83. Sylvia Ayala, one of Medina's sisters with whom he lived when he returned from Arizona, thought he was "mentally ill." She observed him often watching television with the sound off and the radio on; he would

"mumble a lot and talk to himself." He was like "two persons in one": he did not make sense, and often forgot things; he was restless but stayed inside with the windows and shades closed and complained about being spied on. He told her he did not remember anything about the charged offenses. JA 11-14. Irene McIntosh, Medina's other sister, "knew there was something wrong with him" when he returned from Arizona. She and her family were not afraid of him, however. When she visited him in jail he would talk obsessively about items he needed but said he did not remember anything about the offenses. JA 15; RT 308.

Richard Negrete, Medina's former parole officer, had contact with him in 1984, before his arrest, two years before the competency hearing. He did not act "bizarre" and did not have trouble communicating. JA 77. J.D. Green, a sergeant in the jail responsible for classification and discipline, had talked to Medina once about his housing situation after Medina was stabbed. Green believed Medina understood everything they discussed and found him responsive to his questions. JA 79-80. Medina had been in and out of the administrative segregation section, the disciplinary isolation area, and the medical observation cell, as a result of various disciplinary offenses and explosive outbursts. RT 679-680, 682-685.

At the close of the competency hearing, the court instructed the jury that the defendant was presumed to be competent and that the burden of proof to show incompetence was on the defense; and the prosecutor emphasized the burden of proof and the presumption in his closing argument. JA 69-80. The jury returned a verdict finding the defendant competent. JA 88. Petitioner was later found guilty of all the charged offenses and was sentenced to death. CT 1346.

On automatic appeal, the California Supreme Court rejected petitioner's argument that the imposition of the burden of proof on the defendant, and the giving of a jury instruction on the presumption of competency after a

doubt had been found by the trial court as to the defendant's competency, violated due process. JA 93-101. Two justices dissented from this holding. JA 146, 149. This Court granted certiorari. JA 165.

Petitioner now requests that this Court apply its due process precedents to this issue and hold that the imposition of the burden of proof upon the defendant, and the instruction on the presumption of competence after a doubt as to competence has been declared, are constitutionally impermissible.

SUMMARY OF ARGUMENT

Imposition of the burden of proof of incompetence upon a criminal defendant violates due process under the balancing test prescribed by *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the defendant's right not to be tried while incompetent is plainly fundamental; and the state shares an interest in maintaining the integrity of the trial process, which is severely compromised when an incompetent defendant is forced to stand trial. Second, the risk of error is high: competency determinations are made almost entirely on the basis of psychiatric expert testimony; and the inexact nature of that science leaves significant room for doubt as to the accuracy of any result. In addition, empirical data suggest that expert competency evaluations tend to be skewed in favor of finding competency; and, in the competency proceeding, the jury is instructed, not only on the burden of proof, but also that the defendant is presumed to be mentally competent, further skewing the jury's determination of the issue in favor of finding competence. Imposition of the burden of proof upon the state would compensate for this bias in favor of finding competency and would ensure that, in close cases where the allocation of the burden of proof is likely to be outcome-determinative, defendants who are actually incompetent would not bear the risk of being forced to stand trial as a result of an erroneous finding of competency. Third, the cost to the state of bearing the

burden of proof on competency would be minimal. The number of cases in which the issue of competency arises at all is not substantial, and the number of those cases that require contested hearings is extremely small. The evidence relevant to the competency determination is as available to the prosecution as to the defense, and thus preparation for carrying the burden of proof would not impose significant costs upon the state which it does not already have to bear. Further, any interference with the state's interest in proceeding with the criminal prosecution is minimal, since defendants who are committed to psychiatric facilities but who are in fact competent are diagnosed and returned to court in an expeditious fashion.

Other considerations bearing on the due process analysis also favor placing the burden of proof on the prosecution. The common-law rule in effect at the time the Constitution was adopted appears to have placed the burden on the state. Further, the state jurisdictions which impose the burden on the defendant are clearly in a minority. The jurisdictions which have placed the burden on the defendant, either by statute or by decisional law, have done so primarily under the influence of a false analogy to the burden of proof of insanity at the time of the offense, which invokes entirely different considerations in the due process analysis.

Finally, the California jury instruction, imposing an evidentiary presumption of competence in addition to placing the burden of proof on the defendant, irrationally skews the jury's determination in favor of a finding of competence. The presumption is irrational in the context of the competency proceeding, since under state law a hearing on competency occurs only after the court, by expressing a doubt as to competence, impliedly finds facts supporting a prima facie showing of incompetence. Assuming arguendo that the imposition of the burden of proof on the defendant is constitutionally permissible, the treatment of the presumption as evidence in the jury's

deliberations injects an entirely arbitrary and therefore unconstitutional element into the proceedings.

ARGUMENT

I

IMPOSITION OF THE BURDEN OF PROVING INCOMPETENCE UPON THE DEFENDANT ABOUT WHOSE COMPETENCE A DOUBT HAS BEEN DECLARED IS IMPERMISSIBLE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Imposing the Burden of Proof of Incompetence Upon the Defendant Violates the Due Process Test Enunciated in *Mathews v. Eldridge*

Whether a particular procedural protection is mandated by the due process clause of the Fourteenth Amendment involves application of a balancing test:

> " . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

This test has consistently been used to analyze issues as to the allocation and degree of the burden of proof. E.g., *Cruzan v. Director, Missouri Department of Health*, 497 U.S. ___, 111 L.Ed.2d 224, 244 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 111 L.Ed.2d 405 (1990); *Addington v. Texas*, 441 U.S. 418 (1979); *Santosky v. Kramer*, 455 U.S. 745, (1982). Application of the *Mathews* test to the issue presented in this case compels the conclusion that

imposing the burden of proof of incompetence upon the defendant whose competence is in question violates the due process clause.[3]

1. The Defendant's Interest in Being Tried Only if He Is Competent Is Fundamental

There can be no doubt that trial of an incompetent defendant violates the constitutional guarantee of due process of law. *Drope v. Missouri*, 420 U.S. 162, 171-172 (1975); *Pate v. Robinson*, 383 U.S. 375 (1976); *Dusky v. United States*, 362 U.S. 402 (1960). The requirement that the defendant be competent in order to stand trial is "fundamental to an adversary system of justice." *Drope v.*

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[3] The issue can also be characterized as whether there must be an affirmative showing that the defendant is competent. There is a body of opinion which rejects the idea that allocating the burden of proof is relevant in a competency proceeding, but instead focuses upon the duty of the court to make an affirmative finding that the defendant is competent before permitting the criminal prosecution to proceed. *See* ABA, *Criminal Justice Mental Health Standards* § 7-4.8(c)(ii) at 214, 232 (1989); Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence To Stand Trial*, 53 Geo. Wash.L.Rev. 375, 398-399 (1985); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi.L.Rev. 21, 57, 64-66 (1977). The theory of this position is that when it is as likely that the defendant is incompetent as competent-that is, when the evidence is in equipoise – the defendant has not been affirmatively shown to be competent and trial should not proceed. *See United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied sub nom. *Lupo v. United States*, 429 U.S. 1038 (1976). The California statute at issue permits a defendant to be tried when the evidence is in equipoise.

Petitioner's argument here, that he cannot be made to carry the burden of proving incompetence and that the prosecution should have the burden of proving his competence, subsumes that position.

Missouri, supra, 420 U.S. at 172 (citation omitted). Ensuring that a defendant has "a rational as well as factual understanding of the proceeding against him," *Dusky v. United States,* 362 U.S. at 402, protects the accuracy of the trial result, and recognizes the value the society places upon personal dignity and autonomy, by preventing the spectacle of a criminal trial in which the person most concerned is unable to participate. *E.g.,* Note, *Incompetency To Stand Trial,* 81 Harv.L.Rev. 454, 458 (1967).

Plainly, the outcome of a trial in which the defendant plays no part cannot be considered accurate, and an incompetent cannot conduct a defense either alone or through counsel: "[T]he true reason of the law I think to be this, a person of 'non sana memoria,' and a lunatick during his lunacy, is . . . disabled to make his just defence. There may be circumstances lying in his private knowledge, which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defense. . . . " *Trial of Charles Bateman,* 11 How. St. Trials 467, 475 (1685); *Solesbee v. Balkcom,* 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting); 4 W. Blackstone, *Commentaries,* * 24 (1769).

Irrespective of its effect upon the accuracy of the factfinding in the proceeding, the requirement that the defendant be competent ensures that the defendant's strategic choices, which make the defense case the product of the defendant's own will, can be "honored out of 'that respect for the individual which is the lifeblood of the law.' " *Faretta v. California,* 422 U.S. 806, 834, quoting *Illinois v. Allen,* 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring).

The precedents requiring respect for this dignitary interest condition the right of parties to make fundamental decisions upon their competence to do so. In *Faretta v. California, supra,* 422 at 835, the Court recognized a constitutional right to self-representation in criminal cases, explicitly based upon the defendant's competent, even if

unwise, choice to forego representation by counsel. In *Demosthenes v. Baal,* 495 U.S. ___, 109 L.Ed.2d 762, 767-768 (1990), and *Whitmore v. Arkansas,* 495 U.S. ___, 109 L.Ed.2d 135, 151-152 (1990), this Court recognized a defendant's personal right to waive appellate and other post-conviction review, and thus to be executed without exhausting all available avenues of redress, again based upon the defendant's competent choice. *See also Lenhard v. Wolff,* 443 U.S. 1306, 1311-1312 (Rehnquist, J., in chambers), stay denied 444 U.S. 807 (1979). Authorities recognizing the principle that a defendant must be competent in order to control the litigation of his case are legion. *E.g., Alvord v. Wainwright,* 725 F.2d 1282, 1289 (11th Cir. 1984) (counsel ethically obligated to follow competent client's direction not to raise insanity defense); *Foster v. Strickland,* 707 F.2d 1339, 1343-1344 (11th Cir. 1983) (same).

The corollary of the right of a competent party to control the strategic direction of the litigation is the equally fundamental right of a party not to be bound by proceedings in which he cannot rationally participate. In *Pate* itself, this Court held that a defendant about whose competence a question had been raised could not waive the right to a judicial determination of his competence. *Pate v. Robinson, supra,* 383 U.S. at 384. This Court has recognized the same principle, that a defendant's competence is a necessary condition of any proceeding in which substantial rights may be litigated, in other contexts as well. In *Rees v. Peyton,* 384 U.S. 312 (1966), this Court remanded the case for a hearing on the petitioner's competence, and took no action on the petitioner's motion to withdraw a pending petition for certiorari, when counsel expressed a doubt as to his client's competence. In *Anderson v. Kentucky,* 376 U.S. 940 (1964), the Court, upon agreement by the parties, ordered the matter "continued indefinitely," after granting certiorari: in that case, a defendant suffered from the delusion that the General

Electric Company, as well as the judges who had participated in his case, and various other public officials, were engaged in a conspiracy against him. *Anderson v. Comm.*, 353 S.W.2d 381 (Ky. 1961), cert. denied 369 U.S. 829 (1962) and 369 U.S. 863 (1962), cert. granted 371 U.S. 886 (1962); *see also, Martin v. Estelle*, 546 F.2d 177, 180 (5th Cir. 1977) (procedural rights useless if defendant is not competent); *Seidner v. United States*, 260 F.2d 732, 734 (D.C. Cir. 1958) (incompetent party not "master of his own pleadings").

Thus there can be no doubt that the defendant's interest which is affected by the issue of the burden of proof is a fundamental one.[4] How the violation of this fundamental right may affect the proceedings is demonstrated in this case by the defendant's irrational insistence upon the reentry of a plea of not guilty by reason of insanity. Before trial, defense counsel had the defendant examined to determine if such a plea should be entered, but indicated to the court that the defendant himself was likely to oppose its entry. CT 35. Later, a not guilty by reason of insanity plea was entered by the defendant, but at the conclusion of the guilt phase of trial, after an extensive canvass by the court, the defendant withdrew the plea. RT 5875-5876, 5881-5885, 5897-5898. Two days later, however, the defendant insisted upon reentering the insanity plea. RT 5991, 5995-6002. Despite the vehement objections of defense counsel that putting on a fruitless sanity phase would "destroy" the effect of the case in mitigation in the penalty phase (with which the trial court agreed, RT 5993), the defendant maintained that he

[4] In contrast, the availability under state law of affirmative defenses which completely exonerate the defendant of criminal liability may not be constitutionally required, and therefore the due process analysis of the burden of proof on those issues is likely to be different from that presented here. *See State v. Searcy*, 118 Idaho 632, 636, 798 P.2d 914 (1990); *State v. Korell*, 213 Mont. 316, 690 P.2d 992 (1984); *Ake v. Oklahoma*, 470 U.S. 68, 91 (1985) (Rehnquist, J., dissenting).

wanted to go through with the sanity phase. The trial court and defense counsel, believing that they had no option but to accede to the defendant's irrational desire, allowed the reentry of the plea of not guilty by reason of insanity, RT 5993, 5995, 6003; on appeal, the California Supreme Court held that the trial court and counsel were absolutely required to accept the defendant's entry of the plea. JA 123-125. Absent an adequate finding that the defendant was, in fact, competent, the trial court's action in acceding to his irrational wish to reenter the insanity plea, and the upholding of that action on appeal, corrupted the factfinding process. While that corruption is not irreversible in the same sense as a withdrawal of life support, *Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245, it is devastating to the reliability of the factfinding in the criminal proceedings, *see Santosky v. Kramer, supra*, 455 U.S. at 759, and here, the result of the criminal proceeding was a death sentence. The defendant's interest in not being forced to stand trial while he is incompetent is plainly fundamental. Trying an incompetent defendant both deprives him of the ability to contribute to the reliability of the proceedings by participating rationally in them, and enforces against him strategic choices made while he is not rational. *See Seidner v. United States, supra*, 260 F.2d at 734.

2. The Risk of An Erroneous Result Is Significant

The second factor in the *Mathews* analysis is consideration of the risk of error in the determination, and of how the procedure in issue would increase the reliability of the determination. The consequences of an erroneous determination assume particular force here, because this is a capital case: "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring). Thus a "heightened concern for fairness and accuracy," *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), should be applied to the

analysis, since the result of the competency proceeding will determine whether an arguably incompetent defendant will be put on trial for his life.

(a) Reliance Upon Psychiatric Testimony Necessarily Entails A High Risk of Error

The issue presented in a competency proceeding involves scrutiny of the effect of the defendant's mental illness upon his ability to participate in the criminal proceedings, and that inquiry entails the use of psychiatric testimony. As this Court has recognized, there is always a substantial risk of error in a determination which depends upon psychiatric expert testimony.

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court rejected an argument that proof beyond a reasonable doubt of an individual's mental illness and dangerousness should be required to justify civil commitment, relying explicitly upon the uncertainty of psychiatric diagnosis.

> "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.
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> * * *
>
> "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician."

Id. at 429-430. Accordingly, the Court imposed the burden of proof by clear and convincing evidence as a "compromise" between "what is possible to prove and what protects the rights of the individual." *Id.* at 430.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Court again recognized the uncertainty of psychiatric diagnosis:

> "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. . . . By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."

Id. at 81 (footnote omitted). The Court concluded, because of the crucial role played by psychiatric testimony in the defense of insanity and the uncertainty of psychiatric diagnoses, that a defendant had a due process right to the assistance of a psychiatrist in order to litigate the issue adequately.

Again, in *Ford v. Wainwright*, 477 U.S. 399 (1986), in considering the adequacy of state procedures to determine if a convicted defendant is competent to be executed, the Court recognized the "particularly acute need for guarding against error [which] inheres in a determination that 'in the present state of the mental sciences

is at best a hazardous guess however conscientious.' " *Id.*, at 412, quoting *Solesbee v. Balkcom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

As these authorities demonstrate, this Court consistently views determinations based upon psychiatric evidence as carrying a high risk of error. The psychiatric testimony in this case was entirely consistent with this view, since on the basis of similar information about the defendant the experts came to radically different conclusions as to "the meaning of the facts." *Addington v. Texas, supra*, 441 U.S. at 429. Under the *Mathews* test, this factor supports the necessity of protecting against the erroneous deprivation of the defendant's fundamental right to be tried only if he is competent, by imposing the burden of proof of competence on the prosecution.

(b) Other Practical Factors Involved In the Competence Proceeding Increase the Risk of Error

As a practical matter, the risk of error in the competency proceeding is in fact far greater than the reliance upon psychiatric testimony suggests. Several factors contribute to this increased risk.

(i) Confusion Resulting From the Case Specific Nature of the Competence Determination Increases The Risk of Error

The assessment of competence to stand trial is a complicated issue, which does not "turn on the finding of a single fact. . . . " *Id.* at 412. The content of the constitutional standard of competence – that the defendant be able "to assist in preparing his defense," *Drope v. Missouri*, 420 U.S. at 171, "to consult with his lawyer with a reasonable degree of rational understanding" and to have "a rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. at

402 – is dependent upon the complexity of the issues involved in the case and the character of the strategic decisions with which the defendant will be faced. *See* Silten and Tullis, *Mental Competency In Criminal Proceedings*, 28 Hastings L.J. 1053, 1062-1063 (1977). It is universally accepted that the assessment of competence must focus upon the specific demands of the defendant's case. *E.g.*, ABA, *Criminal Justice Mental Health Standards* 173-175 (1989); A. Stone, *Mental Health And Law: A System In Transition* (1975); T. Grisso, *Evaluating Competencies – Forensic Assessments and Instruments* 112 (1986); R. Roesch and S. Golding, *Competency To Stand Trial*, 13-14, 19-24, 33-36, 82-91 (1980); Robey, *Criteria for Competency To Stand Trial: A Checklist for Psychiatrists*, 122 Am.J. Psychiatry 616, 619-620 (1965); Miller and Germain, *The Specificity of Evaluations of Competency To Proceed*, 14 J. Psychiatry and Law 333, 336-337, 344 (1986).

But evidence suggests that lawyers and mental health professionals often do not have an accurate understanding of the standard of competency and do not consistently make an adequate assessment with reference to the specific facts of the defendant's case. R. Roesch and S. Golding, *Competency To Stand Trial* 50, 83-88 (1980); Grisso and Seigel, *Assessment of Competency To Stand Criminal Trial*, in W. Curran, A. McGarry and S. Shah, *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice* 153 (1986); Rosenberg and McGarry, *Competency for Trial: The Making of An Expert*, 128 Am.J.Psychiatry 82 (1972); A. Matthews, *Mental Disability and the Criminal Law* 46 (1970) This case itself provides examples of the problem. In closing argument, the prosecutor claimed that a defendant has to be "almost a vegetable" before he can be found incompetent, and told the jury to look at the defendant, that "he's not a vegetable . . . he's not drooling at the mouth" JA 85; RT

865. This argument may have been only misleading rhetorical excess; but to the extent that it reflected the prosecutor's actual view of the standard of competency, it certainly supports the position in the literature that the standard of competence is poorly understood.

Dr. Pierce's testimony also demonstrates the problem. He testified that the defendant suffered from paranoid schizophrenia, had impaired memory, and periodically hallucinated and lost contact with reality, but that he was competent to stand trial. JA 61-71. When pressed about how the defendant could work with his lawyers if he could not remember the charged offenses, Dr. Pierce indicated only that the defendant would cooperate with counsel "to the extent that he is able." JA 67-68. In discussing the extent of the defendant's knowledge of the nature of the proceedings, Dr. Pierce recounted, under cross-examination by the prosecutor, that the defendant said that the goal of the prosecutor was "to find you guilty and to 'screw you,' " JA 73, which the prosecutor characterized as "a pretty good understanding of what's going on." *Id.* In none of his testimony was Dr. Pierce asked to relate any feature of the defendant's psychotic condition, other than his impaired memory, to any of the specific issues at trial or to any of the strategic decisions likely to arise in a capital prosecution, such as the entry of the plea of not guilty by reason of insanity. Thus despite Dr. Pierce's claim that he was familiar with the competency standards, JA 65, his testimony gave little guidance to the factfinder as to how petitioner's mental disorder actually affected his ability to deal rationally with the proceedings. In the absence of such particularized guidance, the jury was left simply to rely upon his ultimate conclusion that the defendant was competent; and that conclusion appears to be inconsistent with his description of the defendant's mental state. Because the competency determination is so thoroughly dominated by psychiatric expert testimony, the existence

of widespread confusion among mental health professionals as to the applicable standards greatly increases the risk of error in the proceeding.

(ii) The Effects of Any Mental Impairment From Which the Defendant Suffers Increase the Difficulty of Evaluation and Litigation of the Competence Issue

The risk of error is further complicated by the fact that behaviors which make evaluation of a defendant or litigation of the issues more difficult may themselves be symptoms of mental impairment: "incompetent subjects are generally more disturbed and agitated than the competent individuals [and] markedly more confused and suspicious. . . . " Maxon and Neuringer, *Evaluating Legal Competency*, 117 J. Genetic Psychology 267, 272 (1970); D. Shapiro, *Psychological Evaluation and Expert Testimony: A Practical Guide To Forensic Work* 4-9 (1984); Rogers, *Development of A New Classificatory Model of Malingering*, 18 Bull.Am.Acad. Psychiatry L. 323, 325 (1990) (uncooperativeness more characteristic of chronic psychiatric patients than malingerers); Herron, Zonana and Crane, *Competence To Stand Trial In Connecticut*, 11 Bull. Am.Acad. Psychiatry L. 261, 269 (1983) (interdisciplinary approach to patient evaluation difficult when patient paranoid and has difficulty talking even to one interviewer); *see* 2 ALI, Model Penal Code and Commentaries (Official Draft and Revised Comments) § 4.05(3), 233, 239 (1985) (evaluation report should indicate if unwillingness to participate in proceedings is itself result of mental disease); *see also Seidner v. United States, supra*, 260 F.2d at 734 (defendant's delusional belief in own competence). Behaviors characteristic of schizophrenics – for instance, agitation, impulsivity, uncooperativeness, delusions and failure of memory, *see* 1 H. Kaplan and B. Sadok, *Comprehensive Textbook of Psychiatry*, 759-760, 765 (5th ed. 1989) –

not only make evaluation more difficult, but they are likely to be misinterpreted, particularly by lay jurors. Genuine symptoms may, as here, be viewed as showing that the individual is "cantankerous," JA 34, or "more mean than anything else" JA 11.

Similarly, a defendant's inability to control himself during the proceedings may be a product of his mental illness, *see* D. Shapiro, *Psychological Evaluation and Expert Testimony* at 5, but it may be interpreted as being merely manipulative behavior, and therefore as evidence of competence. For instance, here the defendant overturned counsel table during the competency proceeding. JA 81-82.[5] Although Dr. Sakurai, who was on the witness stand when it happened, could not give an opinion as to what caused this incident, RT 751, the prosecutor claimed that it was a purely manipulative act and urged the jury to view it as such. RT 750, 863-864.[6] The defendant's inability to control his behavior or his failure to cooperate in a mental examination may itself be a "manifestation of mental illness, for which he cannot fairly be held responsible." *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 246 (1972) (citation omitted). But practically, the difficulty of interpreting that behavior greatly increases the risk of an erroneous determination of competence, simply because of the effect of the defendant's mental impairment.

The difficulty of a defendant's situation in litigating the issue of competence when he may not even be in control of himself underlies the seminal decision on the burden of proof issue:

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[5] Other verbal and physical outbursts occurred during the competency proceedings and the trial. JA 62, RT 15, 36-38, 671, 699, 916.

[6] The defendant's demeanor can be considered by the jury as evidence in a competency proceeding. *E.g., People v. Prince*, 203 Cal.3d 848, 855-856, 250 Cal.Rptr. 154 (1988).

> "Let us assume that defendant is in fact unable to cooperate with counsel and present his case in a rational manner. It would be a strange rule, indeed, to impose upon him the burden of proving his own incompetence, for the very disability which he would be seeking to prove renders him incapable, either logically or legally, of sustaining the burden of proof."

People v. Bender, 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960); accord, *United States v. DiGilio*, 538 F.2d at 988.

As a practical matter, California law recognizes this problem; and it resolves it by treating the defendant as incompetent for the purpose of the hearing, in flat defiance of the presumption of competency which it simultaneously imposes. The defendant is prevented from making decisions normally reserved to a party explicitly on the ground that such decisions cannot be left to the defendant's apparently "defective judgment." *People v. Samuel*, 19 Cal.3d 489, 495-496, 629 P.2d 485 (1981); *see Pate v. Robinson, supra*, 383 U.S. at 384. "In short, the state has placed on the defendant the burden of proving a fact that, if true, may be very difficult for the defendant to prove." Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L.Rev. 984, 991 (1979). The existence of any mental impairment thus contributes significantly to the risk of error.

(iii) Reflexive Suspicion of Malingering In Evaluating Defendants With Mental Impairments Skews the Results of the Proceeding in Favor of Competence

A related factor increasing the risk of an erroneous outcome is the focus on malingering: the obsession with that issue in the literature on competency suggests a high level of institutional skepticism about any claim of mental illness made by or on behalf of criminal defendants.

Whenever litigation of any sort is involved, "the psychiatrist needs to shift his attitude from not only believing everything the patient says, but to suspecting malingering as well." Ziskin, *Malingering of Psychological Disorders*, 2 Behavioral Sci. L. 39, 40 (1984); Resnick, *The Detection of Malingered Mental Illness*, 2 Behavioral Sci. and the Law 21, 28 (1984) ("above all, malingering must be suspected" in criminal defendants); Resnick, *Malingered Psychosis* in Rogers, ed., *Clinical Assessment of Malingering And Deception* 48-52 (1988); *see* Daniel and Resnick, *Mutism, Malingering, and Competency to Stand Trial*, 15 Bull.Am.Acad. Psychiatry and Law 301, 308 (1987) ("high index of suspicion" of mute defendants).

In turn, any suggestion of exaggeration of symptoms tempts the expert to over-identify competency. Drob, Berger and Weinstein, *Competency to Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull.Am.Acad. Psychiatry and Law 85, 92 (1987); *see also* Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal.L.Rev. 693, 735-736 (1974) (mental health professionals almost always resolve doubtful qūestions to patient's disadvantage). Resnick, *Malingered Psychosis*, in R. Rogers, ed., *Clinical Assessment of Malingering and Deception*, *supra*, at 49 (when condition shows mixture of schizophrenic and antisocial features, mental health professionals may focus only on antisocial traits); Rogers, *Towards An Empirical Model of Malingering and Deception*, 2 Beh.Sci.L. 93, 99 (1984) (elevation of one scale on MMPI test may identify malingering but also identifies psychosis and behavioral disorders.) One small-scale study showed that, even when there was no litigation in question, five out of six patients who had been diagnosed as feigning psychosis were later diagnosed as, in fact, schizophrenic. Hay, *Feigned Psychosis – A Review of the Simulation of Mental Illness*, 143 Brit. J. Psychiatry 8, 10 (1983).

This skepticism toward claims of mental illness and virtual assumption of malingering was forcibly conveyed to the jury in this case. All of the mental health professionals were extensively examined about it, JA 7-8, 22-23, 37, 40-43, 49-50, 52, 55-56, 65-66, and the prosecutor laid great stress on the issue in argument: the prosecutor here rationalized the imposition of the burden of proof on the defendant as necessary, by claiming that otherwise, "every defendant" would claim incompetence and "you wouldn't have any trials occurring." JA 85.[7] In light of the initial production burden, this argument was, of course, highly misleading; but it accurately reflected the atmosphere of suspicion of the claim of incompetence which pervaded the proceeding.

In fact, a tendency to err in favor of finding competency may infect both initial screening evaluations and final expert judgments. Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull.Am.Acad. Psychiatry L. 187, 197-198 (1987) (one screening instrument consistently favors finding of competency); R. Roesch and S. Golding, *Competency To Stand Trial*, *supra*, at 182 (study showing one screening instrument incorrectly classified as competent 40% of defendants later found incompetent); *id.* at 160 (estimated 10% of incompetents erroneously classified as competent); Goldstein and Stone, *When Doctors Disagree: Differing Views On Competency*, 5 Am.Acad. Psychiatry L. 90, 95 (1967) (many psychiatrists favor finding competency in close cases); T. Grisso, *Evaluating Competencies* 99 (1986) (one screening test identified as competent 32% of defendants later found to be incompetent).

Since the jury's determination will almost always be dominated by the opinions of mental health experts, *see*,

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[7] This claim is not novel. *See Trial of Charles Bateman*, 11 How. St. Trials at 476. In 1685, however, it was believed that pretended madness would be discovered. *Id.*

e.g., H. Steadman, *Beating A Rap? Defendants Found Incompetent to Stand Trial* 54 (1979) (court agreed with psychiatric evaluation in 92% of cases); Reich and Tookey, *Disagreements Between Court and Psychiatrist on Competency to Stand Trial*, 47 J. Clinical Psychiatry 29, 29 (1986) (91% rate of agreement between court and psychiatric evaluation on issue of competency), this bias is necessarily reflected in the factfinder's decision, thereby increasing the risk of an erroneous finding of competence.

(iv) The Instruction Injecting the Presumption of Competence Into The Jury's Deliberations Irrationally Increases the Risk of An Erroneous Finding

In addition to the other factors increasing the risk of an erroneous determination of competence in this case was the giving of a jury instruction reiterating the presumption of competence. JA 4, 70; CALJIC No. 4.31 (1984 Rev.). By injecting the presumption into the jury's deliberations as evidence in the case, after the defendant had satisfied the burden of producing evidence to rebut the presumption of competence, this instruction independently violated the defendant's right to due process of law. *See* Part II, below. Instructing the jury that a presumption of competence subsists, after the defendant has produced evidence to support the trial court declaration of a doubt as to competence in order to be entitled to a hearing on the issue, is entirely irrational, and it could only have been understood by the jury as increasing the burden of proof imposed on the defendant. This instruction, in addition to the other factors described above, grossly increased the risk of an erroneous determination of competence.

(c) Placing the Burden of Proving Competence Upon the Prosecution Would Significantly Decrease the Likelihood of An Erroneous Result

In light of the pervasive practical bias against claims of incompetence, imposition of the burden of proof on the defendant gratuitously increases the risk of an erroneous result. Because the defendant's right to be tried only if he is competent is a fundamental one, any error should be made in favor of finding incompetence; and placing the burden of proof on the prosecution would increase the likelihood of that occurring. That allocation of the burden of proof would also increase the accuracy of the result: a commitment to a hospital setting (which in California results from a finding of incompetency) may be the only way to arrive ultimately at a reliable determination. In difficult cases, an extended inpatient evaluation, including professional observation, is more likely to resolve the question of competency accurately. Drob, Berger and Weinstein, *Competency To Stand Trial: A Conceptual Model for Its Proper Assessment*, 15 Bull.Am.Acad. Psychiatry L. 85, 93-95 (1987); *see* Miller and Germain, *Inpatient Evaluation of Competency To Stand Trial*, 9 Health L. Canada 74, 75-76 (1989); D. Shapiro, *Psychological Evaluation and Expert Testimony: A Practical Guide To Forensic Work* 12, 14-18 (1984); *see also* Bagby, Gillis and Dickens, *Detection of Dissimulation With The New Generation of Objective Personality Measures*, 8 Behavioral Sci. L. 93, 102 (1990) (administration of extensive test battery to institutionalized subjects detected malingering with 92.5% success rate); Resnick, *The Detection of Malingered Mental Illness*, 2 Behavioral Sci.L. 21, 30 (1984).

Placing the burden of proof upon the state would thus have significant value in mitigating the inherent risk of harm to the defendant's fundamental interest from an erroneous determination of competency. The allocation of the burden of proof is often outcome-determinative in

close cases of all kinds. *See e.g.*, Underwood, *The Thumb On the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1308 (1977); Weihofen, *The Flowering of New Hampshire*, 22 U.Chi.L.Rev. 356, 360 (1955). In competency proceedings, where, in close cases, the jury will normally be faced with contradictory expert testimony, placing the burden of proof upon the prosecution is likely to prevent an erroneous finding of competency. *See United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1023 (7th Cir. 1985); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1247-1248 (7th Cir. 1982); *cf. Parham v. J.R.*, 442 U.S. 584, 609 (1979) (adversary hearing unlikely to improve accuracy of medical determination).

3. The Impact Upon the State's Interests of the Additional Protection Is Minimal

The third *Mathews* factor is the impact on the state's interests of placing the burden of proof of showing competence upon the prosecution. There is no reason to believe that this impact would be significant, either in terms of monetary cost or in terms of delay of criminal proceedings.

Allocating the burden of proof to the prosecution would have no effect on the initial burden of producing evidence upon the party claiming the defendant's incompetence. No hearing is required unless a "bona fide doubt" (or a "sufficient doubt") of the defendant's competency exists. *Drope v. Missouri, supra*, 420 U.S. at 180; *Pate v. Robinson, supra*, 383 U.S. at 385. Because ["t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed," *Drope v. Missouri*, 420 U.S. at 180, the trial court retains significant power to refuse to declare a doubt as to competency.

Existing California procedures do not allow the burden of proof to become relevant until a doubt of the defendant's competency has been raised and a hearing

ordered, and until substantial evidence has been produced that a defendant is incompetent, no hearing is required. *See People v. Mickle*, 54 Cal.3d 140, 184, 814 F.2d 290 (1991) (no doubt as to competence expressed by trial court); *cf. People v. Marks*, 45 Cal.3d 1335, 1340, 756 P.2d 260 (1988). California courts take seriously the initial production burden: trial courts routinely deny requests for competency hearings, and their actions are upheld on appeal. *E.g., People v. Hays*, 54 Cal.App.3d 755, 759, 126 Cal.Rptr.770 (1976) (court not required to hold competency hearing merely upon counsel's statement that defendant is mentally incompetent); *People v. Stewart*, 89 Cal.App.3d 992, 996, 153 Cal.Rptr.242 (1979) (court not required to hold hearing when counsel's opinion as to competence is not substantial in light of two psychiatrists' reports showing no mental abnormality); *see People v. Mickle, supra*, 54 Cal.3d at 184; *see also Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam) (upholding, as fairly supported by the record, state court's denial of competency hearing).

Federal courts also routinely deny competency hearings when the evidence is insufficient to raise a doubt as to the defendant's capacity to proceed. *E.g., Thompson v. Blackburn*, 776 F.2d 118, 123-124 (5th Cir. 1985); *Sturgis v. Goldsmith*, 796 F.2d 1103, 1109-1110 (9th Cir. 1986); *Fallada v. Dugger*, 819 F.2d 1564, 1568-1569 (11th Cir. 1987). All jurisdictions, including jurisdictions which place the burden of proof of competence on the prosecution, recognize that a substantial initial burden of production must be met before a hearing is ordered. *E.g., People v. Murphy*, 72 Ill.2d 421, 381 N.E.2d 677 (1978); *People v. Doom*, 48 Ill.App.3d 959, 363 N.E.2d 457 (1977); *State v. Weber*, 146 Wis.2d 817, 433 N.W.2d 585 (App. 1988).

In short, no jurisdiction requires competency hearings "on demand." *State v. Janice*, 20 Conn.App.212, 565 A.2d 553, 554 (1989). Accordingly, there is no reason to

suppose that the number of competency claims or competency hearings would increase as a result of the allocation of the burden of proof to the state, and thus the cost of administering the state's criminal justice system would not increase.[8]

There is also no reason to believe that placing the burden of proof on the state would substantially increase the number of contested hearings. As shown above, the

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[8] The scope of any marginal increase in the number of incompetency findings should not be inflated. Commentators have estimated that 25,000 competency evaluations of some sort are conducted annually. *See* Steadman and Hartstone, *Defendants Incompetent To Stand Trial*, in J. Monahan and H. Steadman, eds., *Mentally Disordered Offenders: Perspectives from Law and Social Science* 39, 41 (1983) (estimate based upon 1978 data); *cf.* H. Steadman, *Beating A Rap? Defendants Found Incompetent To Stand Trial* 4 (1979) (estimating 36,000 evaluations annually); Goldstein, *"The Fitness Factory," Part I: The Psychiatrist's Role In Determining Competency*, 130 Am.J.Psychiatry 1144, 1147 n. 2 (1973) (estimated 0.87% of defendants examined for competency in 1973). Of that number, however, the vast majority do not involve disagreements among the examining mental health professionals, or between the mental health professionals and the court. In only about 11% of the referrals is there a need for anything more than a brief screening evaluation, R. Roesch and S. Golding, *Competency To Stand Trial* 186 (1980); Roesch, *Determining Competency To Stand Trial: An Examination of Evaluation Procedures In An Institutional Setting*, 47 J. Consulting and Clinical Psychology 542, 549 (1979); and of those cases, even fewer result in contested hearings. Thus the number of cases in which there is serious disagreement among mental health professionals sufficient to result in a contested hearing, as to a defendant's competence, is extremely small. *See* Schreiber, Roesch and Golding, *An Evaluation of Procedures for Assessing Competence To Stand Trial*, 15 Bull.Am.Acad. Psychiatry L. 187, 197-198 (1987); Bluestone and Melella, *A Study of Criminal Defendants Referred for Competency To Stand Trial in New York City*, 7 Bull.Am.Acad. Psychiatry L. 166, 172 (1979).

outcomes of competency proceedings are overwhelmingly dominated by the evaluations of the psychiatric experts. In turn, those experts agree among themselves on the issue of competency in the vast majority of cases. *See* Goldstein and Stone, *When Doctors Disagree: Differing Views on Competency*, 5 Bull. Am. Acad. Psychiatry and Law 90, 91 (1967) (study showing 2.5% rate of disagreement between psychiatrists); Golding, Roesch and Schreiber, *Assessment and Conceptualization of Competency to Stand Trial*, 8 Law and Human Behavior 321, 328 (1984) (study showing 97% agreement among interviewers); Schreiber, *Professional Judgment in the Assessment of Competency to Stand Trial: Report of An Evaluation Study*, 5 Intl. J.L. Psychiatry 331, 339 (1982) (two cases out of 52 of irreconcilable disagreement among evaluators, including lawyers and mental health professionals); Johnson, Nicholson and Service, *The Relationship of Competency to Stand Trial and Criminal Responsibility*, 17 Crim. Justice and Behavior 169, 176 (1990) (.8% disagreement among mental health professionals in study), Poythress and Stock, *Competency To Stand Trial: A Historical Review and Some New Data*, 8 J. Psychiatry L. 131, 138, 140 (1980). Thus the state arguably would not incur any additional costs except in the very few cases, like petitioner's, where the assessment of competency is a difficult one.

Nor is there reason to anticipate an additional burden to the state in preparing for and shouldering the burden of proof in cases that do require a contested hearing. Most competency hearings, even contested ones, are extremely summary, often involving nothing more than submission of the expert's reports. *See* H. Steadman, *Beating A Rap? Defendants Found Incompetent to Stand Trial* 46-47 (1979). Even when a more elaborate hearing is required, as it was in this case, the cost to the state of preparing for it would be substantially the same regardless of which party has the burden of proof. Here, the prosecutor presented testimony showing the defendant's

behavior in jail; elicited opinions from the experts on their diagnoses, on the issue of malingering, and on the ultimate issue of competence and probed the information on which their opinions were based; and elicited information from members of the defendant's family. There appears to be little more that the prosecutor could have done in the hearing if he had borne the burden of proof.

Nor would obtaining the relevant evidence pose an undue burden. The primary evidence in the competency proceeding, the expert evaluations based on examination of the defendant, are equally available to both parties, *Buchanan v. Kentucky*, 483 U.S. 402, 424-425 (1987); Cal. Evid. Code § 1017, as are the other materials relied upon by the experts. Cal. Evid. Code §§ 802, 804. When the defendant is in custody, the state has an ability to obtain evidence of his behavior which is superior to that of the defense. Here, the prosecutor presented extensive evidence of the defendant's violent behavior through Sergeant Green's records, a jail mental health worker, Mr. Miller, was able to observe the defendant's behavior closely over a period of three weeks, and the defendant was under constant observation when he was in the "rubber room" in the jail. JA 57-58; RT 227-228; *see People v. Mickle*, 54 Cal.3d at 162 (testimony of jailer as to defendant's conduct over previous year); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L.Rev. 637, 654 (1978). The prosecutor may even obtain evidence about the defendant's behavior and demeanor from defense counsel. *See Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1979).[9] In short, allocating the burden of proof to the state would not result in undue costs in connection with preparing for or conducting the hearing itself.

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[9] The question whether evidence of otherwise privileged attorney-client communications may be obtained by the state in a competency proceeding is apparently an open one in California. *People v. Mickle*, 54 Cal.3d at 182-184; *cf. United States ex rel. S.E.C. v. Billingsley, supra*, 766 F.2d at 1027-1028.

The monetary costs of an incompetency commitment would also not be substantial. In cases where the competency issue is a difficult one, allocation of the burden of proof to the prosecution may result in a finding of incompetency and a commitment to a psychiatric facility, which in turn may result in some marginal cost to the state.[10] *See* Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits and A Proposal for Reform*, 39 Rutgers L.Rev. 243, 249-250 (1987). The cost of the commitment, however, is likely to be slight, due to the brief duration of most commitments; and the gain in the accuracy of the determination is substantial. Under these circumstances, "[w]here the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (footnote omitted).

Finally, an incompetency commitment may result in some delay of the criminal proceedings. The state does have an interest in prosecuting criminal actions without undue delay, but a finding of incompetence results in a minimal interference with that interest. A study conducted by the leading authorities in this field disclosed that defendants who were in fact competent and were committed to an inpatient hospital facility for determination of competency were returned to court for trial in an average of 43 days. R. Roesch and S. Golding, *Competency To Stand Trial* 149 (1980). Another study involving a smaller sample established that competent defendants were identified and returned to court in a mean period of 17 days. *Id.* at 178; Geller and Lister, *The Process of Criminal Commitment for Pretrial Psychiatric Examinations: An*

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[10] When the defendant is being held in a high-security or medical area in a county jail, as petitioner was, this marginal cost should be minimal.

Evaluation, 135 Am.J. Psychiatry 53 (1978) (most defendants returned to court "immediately").[11] These studies indicate that the consequences of an erroneous finding of incompetency will not involve undue delay of the criminal proceedings. This minimal delay cannot be considered significant by comparison with the benefit of an adequate opportunity to evaluate the defendant: when a delay is necessary to protect the fairness of the ensuing

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[11] Defendants currently found incompetent to stand trial in California and committed to Atascadero State Hospital are treated and returned to court as competent in an average of a little over three months. Pendelton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 Am. J. Psychiatry 1098, 1100 (1980); Laczko, James and Alltop, *A Study of Four Hundred and Thirty-Five Court Referred Cases*, 15 J. Forensic Sci. 311, 321 (1970) (over 71% of patients hospitalized for competency evaluations returned to court in three months or less); Bennett and Kish, *Incompetency to Stand Trial: Treatment Unaffected by Demographic Variables*, 35 J. Forensic Sciences 403, 408 (1990) (mean length of treatment 5.5 months for defendants committed as incompetent); *see also* Laboratory of Community Psychiatry, Harvard Medical School, *Competency to Stand Trial and Mental Illness* 65 (1973).

Some of the older studies, indicating much longer average duration of commitment upon findings of incompetency reflect abusive practices which are now obsolete. This Court's decision in *Jackson v. Indiana*, 406 U.S. 715 (1972) ended the constitutional acceptance of indefinite commitments of defendants who were merely charged with criminal offenses; and *Lynch v. Overholser*, 369 U.S. 705 (1962), made clear that commitments in criminal cases could not be used as a substitute for civil commitments. Recent evidence suggests that these decisions have significantly diminished the use of incompetency commitments to "warehouse" criminal defendants indefinitely or to deal with matters which cannot be resolved through the normal criminal or civil process. Lamb, *Incompetence To Stand Trial – Appropriateness And Outcome*, 44 Arch.Gen.Psychiatry 754, 756 (1987)

proceedings, "myopic insistence upon expeditiousness . . . can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citation omitted); *see Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245 (erroneous decision not to withdraw life support maintains status quo).

The minor cost and temporary delay in the proceedings which result from an erroneous finding of incompetency can be contrasted with the invasion of the state's interest resulting from an erroneous finding of insanity as an affirmative defense. An erroneous finding of insanity results in complete exculpation; and in light of the irreversibility of the consequences to the state's legitimate interest, a state constitutionally could "conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue." *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring); *Patterson v. New York*, 432 U.S. 197, 207-210 (1977); *see also Cruzan v. Director, Missouri Health Dept., supra*, 111 L.Ed.2d at 245 (irreversibility of impact on party's interest); *Santosky v. Kramer, supra*, 455 U.S. at 759 (same). Thus the state's interests would not be unduly compromised by placing the burden of proving the defendant's competence upon the prosecution.

4. Conclusion

Balancing the relevant factors under the due process of *Mathews v. Eldridge* reveals that the defendant's interest affected by the imposition of the burden of proof is fundamental; the risk of error is substantial, and the allocation of the burden of proof to the state would, in close cases, prevent deprivation of the right; the impact on the state's interests is minimal. The ultimate "societal judgment about how the risk of error should be distributed between the litigants", *Santosky v. Kramer, supra*, 455 U.S. at 755, is clear in this situation: the injury to a

defendant's interests from an erroneous finding of competence is significantly greater than the injury to the state from an erroneous finding of incompetence; and the risk of error is high. Accordingly, imposition upon the defendant of the burden of proving incompetence violates due process under the *Mathews v. Eldridge* test.

B. Imposing the Burden of Proving Incompetence Upon the Defendant Is Historically Unjustified, Not Widely Accepted, And Based Upon Analytical Confusion

Petitioner has shown that imposing the burden of proving incompetence upon the defendant violates the test of due process enunciated in *Mathews v. Eldridge*. Other considerations relevant to the due process analysis support the same result.

In determining whether imposing the burden of proof upon the defendant "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental", *Speiser v. Randall*, 357 U.S. 513, 523 (1958), it is appropriate to examine the historical context of the rule, as well as its current status in the states. *See Addington v. Texas*, 441 U.S. 418, 431-432 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 692-696 (1975); *Leland v. Oregon*, 343 U.S. 790, 796-797 (1953). This analysis reveals that the historical pedigree of the rule is as questionable as the analytical justifications advanced for it; and that the rule does not command wide support among the states.

The common law rule on this issue at the time the Constitution was adopted is not entirely clear, but the rule which can be derived from analogous cases supports petitioner's position. The common law courts treated individuals who were deaf and mute, and therefore incapable of understanding or communicating, as essentially equivalent to those similarly incapacitated as a result of mental disability. *E.g.*, 1 W. Blackstone, *Commentaries*, *

293-294 (1765).[12] For instance, a defendant who was incapable of understanding or communicating because she was deaf and mute was found unfit to stand trial as "insane," under the statute providing for detention of defendants who were mentally incompetent to stand trial. *Dyson's Case*, 1 Lewin. 64, 65-66, 168 Eng.R. 960, 961 (1831); *accord*, *Rex v. Pritchard*, 7 Car. & P. 303, 304-305, 173 Eng.R. 135 (1836).

When such a defendant stood mute at arraignment, and it was determined that the defendant was "mute by the visitation of God" – that is, was not merely refusing to plead – there arose "a presumption of ideotism" which the prosecution was required to rebut. *The King v. Steel*, 1 Leach 451, 168 Eng.R. 328 (1787). Thus immediately before the Constitution was adopted, the English practice placed the burden of proof of capacity to plead on the prosecution.

The rule that the prosecution was required to establish the defendant's fitness to plead was explicitly applied to the question of mental competency in *Ley's Case*, 1 Lewin. 239, 168 Eng. Rpts. 1026 (1828), and that rule was observed without criticism into the twentieth century. *R. v. Sharp*, [1958] 1 All Eng. Rpts. 62; *R. v. Davies*, 3 Car.& K. 328, 329, 175 Eng.R. 575 (1853) (on inquiry into competence, question is whether defendant is "in a fit state to plead" which "lies on the prosecution to make out"); *cf. R. v. Turton*, 6 Cox C.C. 385 (1854) (burden of production on party claiming unfitness to plead due to insanity). Only in 1959 was the rule requiring an affirmative showing of competency to stand trial replaced by a

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[12] The ability to communicate was always the sine qua non of capacity to proceed. In the ninth century, a father was required to pay compensation for the misdeeds of a son born deaf and mute, who could "neither deny nor confess his wrongdoings." Laws of Alfred § 14, in F. Attenborough, ed. and trans., *Laws of the Earliest English Kings* 71 (1922).

rule requiring a showing of incompetency and placing the burden of proof on the party raising the issue. *R. v. Podola*, 1 Q.B. 325, [1959] 3 All Eng.Rpts. 418, appeal dismissed [1959] 3 All Eng.Rpts. 426 (Crim. App.). The trial court in *Podola* confused the burden of proof of insanity as a defense and the burden of showing competency to stand trial, *id.* at 419; and the *Podola* rule has been criticized in its own country for requiring the defendant to go to trial when the evidence of competence is in equipoise: "a man may be convicted although a jury was not satisfied that he was capable of making out a proper defense at his trial." J. Smith and B. Hogan, *Criminal Law* 161 (4th ed. 1978); *see also* Dean, *Fitness To Plead* [1960] Crim.L.Rev. 79, 82.

Thus the rule imposing the burden of proof of incompetency upon the defendant does not come before the court with impressive historical support. This is in sharp contrast to the historical acceptance under the common law and among American jurisdictions of placing the burden of proving the affirmative defense of insanity upon the defendant. *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

The rule imposing the burden of proving incompetence on the defendant also does not enjoy wide acceptance among American jurisdictions. Twenty-three jurisdictions do not impose a burden on the defendant, or specify the degree of proof, by statute or by decisional law.[13] One state imposes the burden of proving competence upon the prosecution, by proof beyond a reasonable

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[13] Ala. Code § 15-16-21 (Michie 1986); Ariz. R. Cr. Pro., Rule 11.1 (West 1987); D.C. Code Ann. § 24-301 (Michie 1989); Haw. Rev. Stat. § 704-405 (1985); Idaho Code § 18-212 (1987); Ind. Code Ann. § 35-36-3-1 (West 1986); Kan. Stat. Ann. § 22-3302 (1988); Ky. Rev. Stats. Ann. §§ 504.100(3) (Michie 1990); Me. Rev. Stat. Ann. tit. 15 § 101-B (West Supp. 1990); Mich. Comp. Laws Ann. § 330.2020 (West 1980); Miss. Code

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doubt.[14] One state requires competency to be proved by clear and convincing evidence and places the burden on the prosecution if the defendant claims incompetency.[15] One state imposes the burden of proving competency on the prosecution by a preponderance by statute,[16] and eight states adopt the same rule by decisional law.[17] One state requires proof of competence by a preponderance but does not allocate the burden of proof.[18]

Three states require proof of incompetence by a preponderance, but do not allocate the burden between the parties.[19] Two states require proof of incompetence by a

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Ann. § 99-13-11 (1972); Mo. Rev. Stat. § 552.020(7) (Vernon 1987); Mont. Code Ann. § 46-14-221 (1989); Neb. Rev. Stat. Ann. § 29-1823 (1989); Nev. Rev. Stat. Ann. § 178.415 (Michie 1986); N.J. Stat. Ann. § 2C:4-6 (West 1982); N.C. Gen. Stat. § 15A-1002 (1988); Or. Rev. Stat. § 161.370 (1990); R.I. Gen. Laws § 40.1-5.3-3(e) (Michie 1990); S.C. Code Ann. § 44-23-430 (Law.Co.Op. 1976); Tenn. Code Ann. § 33-7-301 (Michie 1984); Utah Code Ann. § 77-15-5 (1990); Vt. Stat. Ann. tit. 13 § 4817(b) (1974).

[14] *Treece v. State*, 313 Md. 665, 547 A.2d 1054, 1063 (1988).

[15] Wis. Stat. Ann. § 971.14(4) (West Supp. 1990).

[16] Ill. Rev. Stat., ch. 38, ¶ 104-11(c) (Smith-Hurd 1977).

[17] *McCarlo v. State*, 677 P.2d 1268, 1271-1272 (Alaska App. 1984); *Diaz v. State*, 508 A.2d 861, 863-864 (Del. Super. 1986); *Comm. v. Crowley*, 393 Mass. 393, 471 N.E.2d 353, 357-359 (1984); *State v. Bertrand*, 123 N.H. 719, 465 A.2d 912 (1983); *People v. Santos*, 43 App.Div.2d 73, 349 N.Y.S.2d 439, 442 (1973); *State v. Heger*, 326 N.W.2d 855, 858 (N.D. 1982); *State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987); *Loomer v. State*, 768 P.2d 1042, 1045 (Wyo. 1989).

[18] Minn. R. Crim. Pro., Rule 20.01, subd. 3(6) (West Supp. 1991).

[19] W.Va. Code Ann. § 27-6A(d) (Michie 1986); Wash. Rev. Code Ann. ch. 10.77.090(2) (West 1990); Ohio Rev. Code Ann. § 2945.37(A) (Anderson Supp. 1990).

preponderance and place the burden on the party asserting incompetence.[20] One state imposes the burden upon the defendant but does not specify a standard of proof.[21] Two states require proof of incompetence by clear and convincing evidence and place the burden on the party claiming incompetence.[22] One state places the burden of proof of incompetence by clear and convincing evidence on the defendant.[23] Finally, six states impose the burden of proof of incompetence by a preponderance upon the defendant by decisional law[24] and one – California – imposes the same burden by statute.[25] Thus there is no consensus among American jurisdictions on this issue which would provide clear support for imposing the burden of proof of incompetence upon the defendant.

The number of jurisdictions which adopt or reject the rule imposing the burden of proof on the defendant is, of course, not determinative of the issues: a mere "head count" of jurisdictions cannot substitute for a "considered evaluation or the merits of [the] constitutional claim." *People v. Medina, supra,* 51 Cal.3d at 916 (1990) (Broussard, J., dissenting); JA 151. The major source of error in

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[20] Colo. Rev. Stat. Ann. § 16-8-111(2) (West 1986); Va. Code. Ann. § 19.2-169.1E (Michie 1990).

[21] *Deason v. State,* 263 Ark. 56, 562 S.W.2d 79, 81, cert. denied, 439 U.S. 839 (1978).

[22] Conn. Gen. Stat. § 54-56d(b) (West 1989); Pa. Stat. Ann. tit. 50 § 7403(a) (Purdon 1969 and Supp. 1991).

[23] *Miller v. State,* 751 P.2d 773 (Okla.Crim. 1988).

[24] *Flowers v. State,* 353 So.2d 1259, 1260 (Fla.App. 1978); *Wallace v. State,* 248 Ga. 255, 282 S.E.2d 325, 330, cert. denied 453 U.S. 927 (1981); *State v. Pedersen,* 309 N.W.2d 490, 496 (Iowa 1981); *State v. Rogers,* 419 So.2d 840, 843 (La. 1982); *State v. Chapman,* 104 N.M. 324, 721 P.2d 392, 395 (1986); *Barber v. State,* 757 S.W.2d 359, 363 (Tex.Crim. 1988), cert. denied 489 U.S. 1091 (1989).

[25] Cal. Pen. Code § 369(f) (West 1982).

analyzing the merits of petitioner's claim is the confusion of the issue of present competence with insanity at the time of the offense. In *Jackson v. Indiana,* 406 U.S. 715, 739 (1972), this Court explicitly recognized that the two issues are quite separate: a defendant's "criminal responsibility at the time of the alleged offenses . . . is a distinct issue from his competency to stand trial." The authorities which support petitioner's position respect this distinction, but the contrary cases, such as the decision of the California Supreme Court here, ignore it. Not only does this confusion pervade the caselaw, it also underlies the statutory provision at issue.

The Supreme Court of New Hampshire, avoiding the trap into which the California Supreme Court fell in this case, recognized in *State v. Bertrand,* 123 N.H. 719, 465 A.2d 912, 916 (1983), that there is "no inconsistency" in applying a different burden of proof to the defense of insanity than to the issue of competence: determining a defendant's mental state at a time in the past presents different issues from litigating his present mental state.

In *People v. Bender,* 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960), the Illinois Supreme Court focussed appropriately upon the defendant's questionable mental condition at the present time, which compromised his ability effectively to litigate that issue in the current proceeding. Under those circumstances, the burden of proof could not be placed upon him. In *People v. McCullum,* 66 Ill.2d 306, 362 N.E.2d 307, 310-311 (1977), the court cast that insight specifically in due process terms, relying on *Speiser v. Randall,* 357 U.S. 513, 523 (1958). This position is entirely consistent with this Court's refusal, in *Pate v. Robinson,* 383 U.S. at 384, to apply a waiver rule against a defendant who was arguably incompetent at the time of the supposed waiver.

In *United States v. DiGilio,* 538 F.2d 972, the court accurately assessed the comparative risk of harm under the due process clause:

> "Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder. At that point the triability of a defendant will depend on where the burden of proof is placed. To put the question another way, what we are determining is a rule of law, of due process dimensions, that a defendant about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, . . . the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant."

Id. at 986-987; *see also State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987) ("great injustice" if an incompetent person forced to stand trial); Pizzi, *Competency To Stand Trial in Federal Courts, supra*, 45 U.Chi.L.Rev. at 65-66. This analysis is strikingly similar to the language relating to the permissible allocation of the risk of error in Justice Harlan's opinion in *In re Winship*, 397 U.S. 358, 370-374 (1970) (Harlan, J., concurring).

By contrast, the caselaw which was relied upon by the California Supreme Court in this case is entirely unpersuasive: it adheres doggedly to the confusion of competence with the defense of insanity. In *State v. Aumann*, 265 N.W.2d 316, 319-320 (Iowa 1978), the court was not confronted with a due process challenge under the federal constitution, because counsel had explicitly withdrawn such a challenge in light of this Court's dismissal, for want of a substantial federal question, of an appeal from *Rivera v. State*, 351 A.2d 561 (Del.), appeal dismissed 429 U.S. 877 (1976). The court in Aumann

disposed of the due process claim under the state constitution in reliance upon the reasoning of *Leland v. Oregon*, 343 U.S. 790 (1952) – that is, upon an analysis relevant to the burden of proof of affirmative defenses existing at the time of the offense – which, again, is substantially different from analysis of the issue of current competence. Thus the Aumann decision rests upon the perennial but analytically unsound confusion between present competence and competence at the time of the offense. *See* Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L.Rev. 984, 996-998 (1979).

In *State v. Chapman*, 104 N.M. 324, 721 P.2d 392, 395 (1986), the court rejected a due process argument solely on the basis of a previous case, *State v. Ortega*, 77 N.M. 7, 419 P.2d 219, 228 (1966). *Ortega*, in turn, relied upon the practice in California, although the case cited for the rule, *People v. Lawson*, 178 Cal. 722, 727, 174 P. 885 (1918), simply refers to the "well-settled rule in this state" without any analysis of it. *Ortega* also relied on a text stating that placing the burden of proof on the defendant was the accepted rule. 419 P.2d at 228, citing H. Weihofen, *Mental Disorder As A Criminal Defense* 434 (1954). None of the cases cited by the text in support of this proposition, *id.* at 434 n. 25, contains any constitutional analysis of the question, or identifies any source for the rule other than its equation with the defense of insanity.

In *Wallace v. State*, 248 Ga. 255, 282 S.Ed.2d 325, 330 (1981), the court rejected the constitutional challenge, as in *State v. Aumann*, by confusing the question of present competency with that of insanity at the time of the offense as an affirmative defense. The whole of the court's "analysis" of the issue was:

> "The constitutionality of placing the burden of proving insanity upon the defendant has been recognized by this Court and by the Supreme Court of the United States. *Durden v. State*, 239 Ga. 697 [238 S.E.2d 334] (1977); *Patterson v. New*

York, 432 U.S. 197 [97 S.C. 2319, 53 L.Ed.2d 281] (1977)."

Finally, in *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987), affirmed on other grounds 484 U.S. 231 (1988), the court's discussion of the issue was dictum: it found that any error with respect to the allocation of the burden of proof was harmless because the expert testimony was uniformly that the defendant did not have any mental disease or defect resulting in incompetency. *Id.* at 295. On the merits, despite its condescension toward caselaw adopting petitioner's position, the *Lowenfield* decision offered absolutely nothing by way of due process analysis of the issue, beyond relying upon *Leland*. The decision asserts merely that "[w]e see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant. . . . " *Lowenfield v. Phelps, supra*, 817 F.2d at 294.[26] Nothing in these cases suggests a reasoned basis for rejecting the due process analysis relied upon by petitioner.

The California statute at issue here suffers from the same confusion which infects these cases. The Legislature adopted the term "incompetence" deliberately, in order to avoid confusion with the defense of insanity at the time of the offense. Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent To Stand Trial*, 6 Pacific L.J. 484, 484 n. 3 (1975). At the same time, however, it adopted the burden of proof provisions as a reflection of the rule imposed by California caselaw, which was based upon that very confusion.

In the legislative history of the provision, the language imposing the burden of proof is described as a "nonsubstantive change," thus suggesting that the legislature believed it was merely codifying the decisional law. Assembly Committee on Criminal Justice, *Bill Digest*,

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[26] One federal case follows *Lowenfield* without any independent analysis of the issue. *Wallace v. Kemp*, 581 F.Supp. 1471, 1478 (M.D. Ga. 1984), rev'd on other grounds 757 F.2d 1102 (11th Cir. 1985).

AB 1529 at 1 (1973). But the cases referred to in support of the presumption of mental competency and burden of proof included in the bill, *see* Parker and Hayes, *Mental Incompetence To Stand Trial – California's Answer* (Analysis of AB 1529 by the California Attorney General) 15 (1974), in fact restate the same erroneous equation of insanity as a defense and competence at the time of the trial: "although the tests to determine capacity are different . . . the burden of proof is on the defendant to establish his insanity on each of these issues." *People v. Vaughn*, 262 Cal.App.2d 42, 55, 68 Cal.Rptr. 366 (1968); *People v. Glover*, 257 Cal.App.2d 502, 512, 65 Cal.Rptr. 8 (1967) (discussing only insanity at time of crime as defense). The statute under review here thus merely incorporates the historical confusion between competence at the time of trial and sanity at the time of the offense.

C. Conclusion

As shown above, the rule imposing the burden of proof of incompetency upon the defendant cannot survive due process analysis, and neither its historical pedigree, nor its acceptance among the states, otherwise recommends it. Accordingly the judgment of the California Supreme Court, rejecting petitioner's challenge to the rule, must be reversed.

II

THE JURY INSTRUCTION IMPOSING A PRESUMPTION OF COMPETENCE, AFTER THE TRIAL COURT HAD DECLARED A DOUBT AS TO THE DEFENDANT'S COMPETENCE AND EVIDENCE IN SUPPORT OF INCOMPETENCE HAD BEEN PRESENTED, INJECTED AN IRRATIONAL ELEMENT INTO THE JURY'S DELIBERATIONS IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW

At the close of the competency proceeding, the court instructed in the terms of CALJIC No. 4.10 (1984 Rev.), which told the jury that "[t]he defendant is presumed to

be mentally competent. . . . " JA 87; CT 419. This instruction injected an irrational and arbitrary presumption as evidence into the jury's deliberations, which skewed the assessment of the defendant's competence in violation of the due process guarantee of the Fourteenth Amendment.

Petitioner does not contend that the presumption of competency is irrational or otherwise improper to the extent that it imposes a burden of production upon any party initially claiming that a defendant is not presently competent. Once evidence of incompetence has been produced, however, and particularly once the trial court has formally declared a doubt as to the defendant's competence, the presumption cannot rationally survive in the proceedings to determine that issue. *See* Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L.Rev. 843, 856-859 (1981); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L.Rev. 637, 695-698 (1978).[27]

This Court has consistently recognized that a "presumption is not evidence and may not be given weight as evidence. [Citations.]" *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938); *Mobile J. & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *The Wildcroft*, 201 U.S. 378, 388 (1906); *Lincoln v. French*, 105 U.S. 614 (1882); *accord, United States v. Hendrix*, 542 F.2d 879, 882 (2d Cir. 1976); *Alpine*

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[27] Since it is the evidentiary use of the presumption which is in issue rather than any burden-shifting function it may perform, some questions normally associated with analysis of presumptions do not arise. Whether the competency proceeding is a civil or a criminal one, *see, e.g., Hicks v. Feiock*, 485 U.S. 624, 631-641 (1988), and whether the presumption could have been understood by a juror as a mandatory or permissive one, *see, e.g., Ulster County v. Allen*, 442 U.S. 140, 156-162 (1979), are not directly involved. What is involved is the basic requirement of the due process clause that any state-imposed evidentiary rule be rational; and the evidentiary use of the presumption of competence in this context is not rational.

Forwarding Co. v. Pennsylvania R. Co., 60 F.2d 734, 736 (2d Cir. 1932) (per L. Hand., J.) ("If the trial is conducted properly, the presumption will not be mentioned at all. . . . "); 9 J. Wigmore, *Evidence*, § 2511 at 533 (Chadbourn Rev. 1981) ["no presumption can *be* evidence"]; J. Thayer, *A Preliminary Treatise On Evidence at the Common Law* 337 (1898).

Even the most powerful of constitutional presumptions, the presumption of innocence, is not evidence. *Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12. In *Taylor*, this Court acknowledged that the presumption of innocence in a criminal action is not technically a presumption but a restatement of the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt. 436 U.S. at 483-486. *Taylor* held, however, that on request a jury should be instructed on the presumption of innocence, in addition to proper instructions on the prosecution's burden of proof, because of its "salutary effect upon lay jurors." *Id.* at 484. Because of "the suspicion that arises from the arrest, the indictment and the arraignment" *Id.* at 485, quoting 9 J. Wigmore, *Evidence*, § 2511 at 407, the jury may in fact find it difficult to disregard those circumstances and to restrict its determination of the defendant's "guilt or innocence . . . solely on the basis of the evidence introduced at trial . . . . " *Id.* Thus, "the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence." *Id.* at 484.

In petitioner's case, unfortunately, the "significant additional guidance" provided to the jury by the instruction on the presumption of competence was irrational. Under California law, the court's institution of proceedings under section 1368 implies a "prima facie" showing of the defendant's incompetence. *People v. Samuel*, 29 Cal.3d 489, 495-496, 629 P.2d 485 (1981); *Shephard v. Superior Court*, 180 Cal.App.3d 23, 30, 225 Cal.Rptr. 328 (1986).

In the course of the section 1368 proceedings, the defendant's right to make decisions normally reserved exclusively to a competent party is severely restricted on the ground that such decisions cannot be committed to the apparently incompetent defendant's "defective judgment." *People v. Samuel*, 29 Cal.3d at 496. In short, the evidentiary presumption contained in the jury instruction is not merely "strained," *see Tot v. United States*, 319 U.S. 463, 468 (1942), it is perverse, based upon the state's actual treatment of the defendant in the competency proceeding. In addition, the California statute explicitly providing that a presumption is not evidence, Cal. Evid. Code § 600, subd. (a), highlights the irrationality of the instruction here.[28]

The due process clause prohibits the use of presumptions which are arbitrary and irrational. *E.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28-30 (1976); *see Manley v. Georgia*, 279 U.S. 1, 6-7 (1929). The evidentiary use of the presumption of competency in the proceeding to determine that issue is precisely such an arbitrary and irrational use. The situation presented here is functionally

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[28] The California statute was adopted to overturn decisional law allowing the evidentiary use of presumptions.

> "[T]he doctrine that a presumption is evidence imposes upon the party with the burden of proof a much higher burden of proof than is warranted. . . . To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof."

Assembly Committee Comment, 1965 Cal. Stats. ch. 299, in Cal.Evid. Code 45 (Parker 1991). In adopting the statute, the legislature followed the views of the most eminent California jurist who had criticized the use of presumptions as evidence. *Id.; Scott v. Burke*, 39 Cal.2d 388, 405-406, 247 P.2d 313 (1952) (Traynor, J., dissenting.)

indistinguishable from that presented in *Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639 (1929). There, a state statute provided that when a death occurred in a railroad collision, the railroad was presumed to be negligent. The plaintiff proved the death of the victim and alleged the railroad's negligence, but the railroad produced evidence tending to show that its agents had not, in fact, been negligent. The trial court nevertheless instructed the jury that the railroad was presumed to be negligent. *Id.* at 640-641. This Court held that, in light of the railroad's production of evidence contrary to the presumption, the instruction injecting the presumption into the jury's deliberations – giving it the "effect of evidence to be weighed against opposing testimony" – was irrational and arbitrary and therefore constitutionally impermissible. *Id.* at 642-644.

Here, not only was the instruction on the presumption irrational, it was phrased in language that a reasonable juror would have understood as imposing a mandatory presumption on the ultimate issue. *See Francis v. Franklin*, 471 U.S. 307, 315-316 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979). The force of such an instruction is sufficiently powerful to effect an unconstitutional shifting of the burden of proof, *id.*; and, like all improper instructions or comments on the evidence emanating from the trial judge, it is likely to have a significantly deforming effect upon the jury's deliberations. *See, e.g., Griffin v. California*, 380 U.S. 609, 614-615 (1965) (effect of judicial comment on defendant's silence at trial). The effect of the instruction in this case, which presented a close question on the issue of competence, can only have been to encourage the jury to view the burden of proof imposed on the defendant as being even greater than the preponderance of evidence required by the remainder of the instruction.

As petitioner has shown, imposition of the burden of proof upon the defendant is impermissible under the due

process guarantee of the Fourteenth Amendment. But however the burden may be allocated, the injection into the jury's deliberations of a presumption which is irrational in the context of the competency hearing cannot constitutionally be justified, nor did the decision of the California Supreme Court under review purport to justify it. Accordingly, the judgment should be reversed.

CONCLUSION

Petitioner submits that the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

No. 90-8370

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF ON THE MERITS

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QUESTION PRESENTED

In a state criminal prosecution, does the Due Process Clause of the Fourteenth Amendment mandate that the state prove facts beyond those encompassing elements of the crime charged, by assuming the burden of proof for demonstrating a defendant's mental competency to stand trial?

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STATEMENT OF THE CASE

Petitioner was sentenced to death following his conviction for three murders and various other crimes after a trial by jury in Orange County Superior Court. The California Supreme Court denied petitioner's automatic appeal in People v. Medina, 51 Cal.3d 870, 274 Cal.Rptr. 849, 799 P.2d 1282 (1990). (JA 89-163.) On October 21, 1991, this Court granted a petition for writ of certiorari. (JA 165.)

STATEMENT OF FACTS

Petitioner began a 27-day crime spree in October of 1984, when he ran out of a Santa Ana pawn shop with a handgun. (JA 90.) During the course of robbing two gas stations and a drive-in dairy, petitioner shot and killed an employee at each business. (JA 90.) His victims, Horacio Ariza, Douglas Metal, and Victor Rea, were each shot in the side of the head at close

range. When his attempts to rob a convenience store failed, petitioner shot at two citizens, who tried to follow his getaway car. (JA 90.) After arresting petitioner, the registered owner of the getaway car, police recovered the murder weapon from his home. (JA 90.) Petitioner asserted an insanity defense and has never denied the robbery-murders. (JA 90.)

Competency Hearing

A six day pre-trial competency hearing was held before a jury on motion of defense counsel. (JA 3, 6, 16, 20, 80, 84; III RT 567.) Three mental health experts and two physicians testified about petitioner's mental and physical condition, but rendered no opinion about competency to stand trial. Three experts evaluated petitioner to determine competency. One psychiatrist found him incompetent, while another psychiatrist and a psychologist found him competent.

George Sakurai, psychiatrist and director of the Orange County Jail psychiatric team, had seen petitioner approximately eight times primarily for suicidal reasons, agitation and destructive behavior. (JA 6-7; I RT 237.) Sakurai opined the suicide attempt may have been faked as his injuries were "extremely superficial scratches" despite petitioner's possession of half a razor blade. (I RT 235-236, 256.) Sakurai knew petitioner did not want to go to court two weeks earlier, when he returned from court with superficial cuts on his neck. (II RT 233, 255, 257.)

Sakurai was not requested to evaluate petitioner in terms of competency to stand trial, had no experience in that area, and therefore declined to render an opinion. (JA 8-9; I RT 242-243.) Sakurai cleared petitioner to return to court and opined

petitioner's most serious problem was depression. (JA 9-10.)

David Echeandia, a psychologist and clinical director at the Orange County Jail testified that his initial progress note indicated a possibility that petitioner was adopting bizarreness and illness for the sake of his defense. (JA 16, 45.) Echeandia had spoken with petitioner approximately six times and did not consider him to be a paranoid schizophrenic. (JA 18; II RT 332.) While petitioner could at times be quite manipulative, it could not entirely explain his behavior. (JA 43.) Echeandia's diagnosed petitioner as having borderline personality disorder with antisocial features. (JA 46.) Echeandia had not spoken with petitioner regarding competency to stand trial, and made no evaluation on that question. (JA 44.)

Willard Gold, a psychiatrist, knew petitioner as "Frank Rocco" when Gold was Chief Psychiatric Consultant at Arizona Department of Corrections (JA 21, 26-27.) Gold had seen petitioner approximately twice a month between December 20, 1977 and January 18, 1979. (JA 27, II RT 431, 447.) He also saw defendant for an hour the night before Gold's testimony at the competency hearing. (JA 28, 31.)

Gold testified that he found petitioner to be the same as he was in 1979, a paranoid schizophrenic. (JA 29.) He opined that petitioner was not depressed, not suicidal and not a malingerer. (JA 29.)

Gold opined that petitioner was incompetent to stand trial. (JA 29.) Petitioner knew who his defense attorney was and he recognized Dr. Gold, but his psychotic denial precluded him from

recalling why he was being charged with murder. (II RT 433.)

Gold had no information regarding the crimes petitioner was charged with, but knowledge of the facts of the case against petitioner would not alter his conclusion. (II RT 455, 459.) Gold acknowledged that other medical experts disagreed with his diagnosis of schizophrenia in 1978, including a nationally recognized psychiatrist who concluded that petitioner had no sign of mental disorder. (JA 31-35.)

Kaushal Sharma, a self-employed forensic psychiatrist, interviewed petitioner twice in a padded cell at Orange County Jail the month before the competency hearing. (JA 46; II RT 510.) Petitioner was very uncooperative and kept repeating, "I'm paranoid. I'm taking medication. I can't talk to you." (JA 52.) It was difficult to make an

assessment because petitioner was refusing to cooperate.[1/] (JA 53.) The available information, however, suggested competency, rather than incompetency. (JA 48.) It was not a close case in Sharma's opinion. (JA 48.)

Sharma noted that petitioner's behavior was abnormal, as stabbing people is unusual. (II RT 537.) Executing witnesses is also statistically unusual. (II RT 555.) Petitioner, however, "is not a slave of his mental problems." (II RT 542.) As Sharma pointed out to the jury, petitioner is an extremely clean and tidy individual whereas very disturbed people cannot care for their personal hygiene. (II RT 546-547.)

During his last visit with petitioner, Sharma suggested that

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1. Dr. Sharma noted that petitioner was more cooperative when he saw him in 1985 at the request of petitioner's defense counsel. (II RT 564.)

petitioner could answer questions but was not cooperating. Petitioner then stood and shook the glass partition in the interview room until it shattered. (II RT 552.) Based on his personal contacts with petitioner and his review of petitioner's 15 year history, Sharma opined petitioner was malingering. (II RT 523-524.)[2/]

Robert Miller, a mental health specialist with the Orange County Jail testified that the initial working

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2. Gold, the only expert who found petitioner incompetent, acknowledged that transfer to a less secure setting is a motive for malingering. (II RT 445.) While in prison in Arizona, petitioner requested to be transferred to a hospital. (II RT 441.) Petitioner had previously escaped from the courtroom while being sentenced for rape. (II RT 449.) Gold recommended petitioner be transferred to the hospital. (II RT 442.) After petitioner was in a hospital setting, he broke out a window and attempted to escape. (II 442.) A recent weight gain prevented petitioner from making good his escape. (II RT 449.) Gold also acknowledged that avoiding the gas chamber is a motive for malingering. (II RT 444.)

diagnosis when petitioner was first interviewed was schizophrenia, paranoid type. (JA 56-57.) After three weeks of observing and talking with petitioner, and receiving and reviewing other records, the diagnosis evolved into malingering and antisocial personality disorder. (JA 57-58.)

Psychologist, David M. Pierce, met with petitioner in January and February of 1986 for about nine hours and conducted psychological testing. (JA 60; III RT 600.) Results were similar to persons who suffer from schizophrenia, paranoid type, and also with individuals who tend to use regression and denial extensively. (JA 61.)

Pierce spoke with petitioner again in June of 1986 and petitioner did not initially recognize him. (JA 62.) There were many instances where petitioner indicated to Pierce that his memory was

impaired. (JA 63-64.) Petitioner also reported having visual and auditory hallucinations. There was no way to corroborate this. (JA 70.)

Pierce opined that petitioner was competent to stand trial. (JA 64.) Petitioner understood the implications of being found guilty and courtroom procedure. (JA 72.) He described the role of the jury, judge, prosecutor and defense attorney. (JA 73.)

A defense investigator testified that he was unable to discuss the case with petitioner. (JA 84.)

Sanity Phase

Petitioner and lay witnesses recalled his background. He denied any recollection of shooting his victims and outlined numerous assaults, which occurred both in and out of custody, along with his drug use, and attempted escape from a state mental hospital. (JA 92.)

Dr. Gold, testifying for the defense, opined petitioner was a chronic paranoid schizophrenic and was not guilty by reason of insanity. (JA 91.) On cross-examination, Gold conceded he knew nothing of the facts surrounding petitioner's crimes. (RT 6409-6416.)

Dr. Pierce testified that petitioner had a disorder of schizophrenia of a paranoid type, but the evidence did not show he was insane at the time he committed the crimes. (JA 91.)

Dr. Sharma testified that irrespective of whether petitioner was a paranoid schizophrenic, the evidence, particularly the manner in which the crimes were committed, was not sufficient to suggest he was insane at the time of

the offense.[3/] (JA 91; RT 6632, 6634, 6704-6716.)

Dr. Klatte, a psychiatrist, testified that petitioner had no evidence of any kind of mental disturbance which precluded his knowing the nature or quality of his actions and their wrongfulness. Klatte detected evidence of both paranoid schizophrenia and an anti-social personality disorder and found petitioner to be one of the most explosive personalities he had ever met. (JA 92; RT 6879, 6886-6896, 6904-6906.)

Penalty Phase

The prosecution proved petitioner robbed and murdered another gas station

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3. Dr. Sharma observed that petitioner has a "short fuse", which is not a symptom of schizophrenia. Petitioner had a number of symptoms consistent with a sociopathic type of personality. (RT 6636-6637.) Sharma also testified that petitioner's lack of recollection of the crimes could not be supported by medical or psychiatric facts. (RT 6651.)

attendant with the same gun used to kill his three victims in this case. Additionally, evidence of previous crimes and convictions and the passive personalities of the murder victims was introduced. (JA 92.) Petitioner relied on mitigating testimony from medical experts and his father. (JA 92.)

SUMMARY OF ARGUMENT

A state is required to prove only the elements of a criminal offense. A criminal defendant's competency to stand trial is not an element of any charged offense.

Constitutional law affords states great latitude in the proper placement of burdens of proof. Due process concerns arise only when the allocation of that burden subjects defendants to hardship or oppression. A defendant's counsel is in the best position to present evidence relevant to the question of competency.

While defense counsel can readily attest to the situation with a defendant, the People have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings. Accordingly, California's allocation of the burden of proof, through a presumption of competency to stand trial, does not offend concepts of due process of law.

ARGUMENT

I

REQUIRING A CRIMINAL DEFENDANT TO PROVE INCOMPETENCY TO STAND TRIAL DOES NOT VIOLATE THE RIGHT OF DUE PROCESS GUARANTEED BY THE FEDERAL CONSTITUTION

Petitioner Medina complains his right to due process of law guaranteed by the Fourteenth Amendment was violated when California law required him to prove by a preponderance of the evidence that he was mentally incompetent to stand trial on criminal charges. To the contrary,

California's allocation of the burden of proof on the party raising the competency issue is consistent with this Court's recognition of the great latitude the federal constitution affords states in the proper placement of burdens of proof. Petitioner has not been denied due process of law and his sentence of death should be affirmed.

It is well established that the conviction of a criminal defendant while he is legally incompetent violates due process of law. (Pate v. Robinson 383 U.S. 375, 385 (1966).) A trial court's failure to employ procedures to protect against trial of an incompetent defendant violates a defendant's due process right to a fair trial and compels reversal of his conviction. (Ibid., see, Drope v. Missouri 420 U.S. 162, 171 (1975).)

The criteria for determining mental competency enunciated by this Court in

Dusky v. United States, 362 U.S. 402 (1960) involves a defendant's ability to "consult with his lawyer with a reasonable degree of rational understanding" and to have a "rational as well as factual understanding of the proceedings against him."

The requirements due process imposes vary depending on the right involved. As Chief Justice Rhenquist observed in his dissent in Santosky v. Kramer 455 U.S. 745 (1982)):

> "Due process of law is a flexible constitutional principle. The requirements of which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, 'not all situations calling for procedural safeguards call for the same kind of procedure.' [citations omitted] The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand." (Id., pp. 774-775.)

Before this Court will hold that the constitution requires a state to do more, the "fairness and reliability" of existing state procedures must be considered. (Santosky v. Kramer, supra, 455 U.S. at p. 775.)

California law provides for a hearing on the question of competency to stand trial if "a doubt arises in the mind of the judge as to the mental competence of the defendant", the court shall inquire of defense counsel, and if defense counsel believes his client may be incompetent, the trial court shall order a hearing. (Cal. Pen. Code, § 1368(a).) Even if defense counsel believes his client to be competent, the trial court has discretion to order a competency hearing. (Cal. Pen. Code §1368(b).) Once the trial court has ordered a competency hearing "all proceedings in the criminal prosecution shall be suspended until the question of

the present mental competence of the defendant has been determined." (Cal. Pen. Code § 1368(c).)

California law places the burden of proof on the question of a criminal defendant's competence to stand trial on the party raising the issue. (People v. Medina 51 Cal.3d 870, 799 P.2d 1282 (1990); JA 100-101.) Specifically, section 1369, subsection (f) of the California Penal Code provides:

> "In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally incompetent unless it is proved by a preponderance of the evidence that the defendant is mentally competent. The verdict of the jury shall be unanimous." (Cal. Pen. Code, § 1369(f); emphasis added.)

Here, petitioner's counsel made a motion for a competency hearing.

Accordingly, the burden of proof on the

question of mental competency to stand trial was placed on petitioner.

A. <u>The Federal Constitution affords states great latitude in the proper placement of burdens of proof</u>.

An analysis of previous decisions by this Court compels the conclusion that due process does not require the prosecution to bear the burden of proof on the question of mental competency to stand trial. Due process demands that every fact necessary to constitute the charged crime must be proved by the prosecution beyond a reasonable doubt. (<u>In Re Winship</u>, 397 U.S. 358, 364 (1970).) The beyond a reasonable doubt burden of the prosecution, however, does not apply to all factual determinations related to a criminal prosecution.

In <u>Leland v. Oregon</u> 343 U.S. 790 (1952) this Court distinguished issues of fact in criminal proceedings which do not require application of the beyond a

reasonable doubt standard. Specifically, Leland held there is no constitutional requirement that the state shoulder the burden of proving the sanity of a defendant at the time of an offense.

The question of insanity as a defense to criminal charges was considered by the jury only after it had found all of the elements of the offense, including mens rea, if any, had been proven beyond a reasonable doubt. Legal insanity bears no necessary relationship to the existence or non-existence of the required mental elements of the crime. (Leland v. Oregon, supra, 343 U.S.)

This Court's opinion in Leland clearly stands for the proposition that it does not offend the federal constitution to place upon the defendant the burden of establishing matters which have no necessary relationship to the elements of

the crime. This Court has repeatedly reaffirmed this principle.

In Mullaney v. Wilbur, 421 U.S. 684 (1975) this Court concluded a state could not require a defendant to prove certain elements to reduce the crime of murder to manslaughter. In a concurring opinion, however, then Justice Rehnquist, made it clear that the Mullaney decision did not change the rule first announced in Leland, i.e., that it was constitutionally permissible to require the defendant to carry the burden of proof on a mental defense such as insanity. (Mullaney v. Wilbur, supra, at pp. 705-706.)

In Patterson v. New York 432 U.S. 197 (1977) this Court upheld the constitutionality of a New York law which required a defendant charged with second degree murder to prove by a preponderance of the evidence extreme mental disturbance, which was an affirmative

defense reducing his crime to manslaughter. In Patterson, this Court also reaffirmed Leland. (Patterson v. New York, supra, at p. 205; see, Rivera v. Delaware, 429 U.S. 877 (1976).)

In Martin v. Ohio, 480 U.S. 228 (1987) this Court upheld Ohio provisions that placed the burden of proving an affirmative defense on the defendant in a criminal proceeding. In reaching this conclusion this Court again reaffirmed its decision in Leland v. Oregon, supra. (Martin v. Ohio, supra, at p. 236.)

In California, the competency hearing is not a criminal proceeding. (People v. Fields 62 Cal.2d 538, 540, 42 Cal.Rptr 833, 399 P.2d 369 (1965).) Moreover, it has no relation to proving the elements of criminal conduct. Rather, a section 1368 proceeding involves the defendant's mental state for standing trial. It assesses his ability to cooperate with counsel at the

time of trial, not his mens rea at the time the crimes were committed. Under these circumstances none of the decisions of this Court compel the conclusion the state must carry the burden of proving a lack of mental competency to stand trial. The state only carries the burden of proof when it must prove the elements of a crime. (See e.g., Martin v Ohio, supra, 480 U.S. 228; Patterson v. New York, supra, 432 U.S. 197.)

Petitioner unpersuasively asserts that the analogy to Leland rests with historical confusion between insanity at the time of the offense and incompetency at the time of trial. To the contrary, the analogy rests with the fact that there is no necessary relation between the competency to stand trial determination and guilt.

The culpability of a defendant is not in issue in a competency proceeding.

Competency relates to the appropriateness of trial and has no relevance to the question of culpability. It does not necessarily follow that error favoring the prosecution will result in an innocent person being convicted. A defendant will have the protections of the beyond a reasonable doubt standard at trial, irrespective of how the burden of proof is allocated at a competency hearing. The constitutionally compelled beyond a reasonable doubt rule is not offended by the allocation of the burden of proof in competency proceedings.

Petitioner argues, however, that the analogy to Leland must fail because the right to present an insanity defense does not involve a fundamental right, whereas the right not to be tried while mentally incompetent is a fundamental right. This argument is meritless.

This Court has clearly recognized that there are fundamental rights where there is no necessary relation between the determination of the right and the guilt determination in a criminal trial. For example, the constitution does not mandate that voluntariness of a confession be established beyond a reasonable doubt. (Lego v. Twomey 404 U.S. 477, 486-487 (1972).) Lego recognizes that where the accuracy of a determination may enhance, impair, or have no effect, on the question of guilt, there is no necessary relation between the proceeding and the issue of guilt. Accordingly, those determinations, even if involving fundamental constitutional rights, are not subject to the requirements of Winship.

B. The history of the requirement of mental competency for trial supports California's allocation of the burden of proof.

The principle that a mentally incompetent defendant not stand trial has

common law origins and acceptance as a principle of fundamental fairness. The importance which has historically been attached to the right to be competent should also be examined. (See, In re Winship, supra, 397 U.S. 358, 363-368).) Petitioner unpersuasively contends that California's procedure cannot be historically justified.

Historically, a criminal defendant was unevenly matched, compelled to proceed in pro se against an experienced prosecutor. (Winick, *Restructuring Competency to Stand Trial*, 32 U.C.L.A. L.Rev. 921, 952; See also, Faretta v. California 422 U.S. 806 (1975).) The criminal defendant stands before the court in a far different position today, based on the constitutional guarantee of adequate counsel, irrespective of ability to pay. (See, Gideon v. Wainwright 372 U.S. 335 (1963).)

In California, a criminal defendant cannot represent himself in a competency proceeding. The trial court has a continuing duty, the defense attorney and prosecutor a continuing ethical obligation, to raise the issue of competency at any point in the proceedings, even if a hearing has already been held. These protections distinguish the modern defendant from those tried at common law.

Moreover, what is significant about petitioner's historical analysis is the fact that English common law developed to the point in 1959 where it placed the burden of proof on the question of competency on the party raising the issue. (R. v. Podola, 1 Q.B. 325, 3 All Eng.Rpts. 418, appeal dismissed 3 All Eng.Rpts 426 (Crim.App. 1959). Since at least 1918 it has been established in California that a defendant has the burden of establishing

incompetency to stand trial. (People v. Lawson 178 Cal. 722, 727 (1918); see also, People v. Mayes, 202 Cal.App.3d 908, 916, 248 Cal.Rptr 899 (1988).) California and England are not alone in requiring defendants to bear the burden of proof on the question of competency.

California is among 14 states which place the burden of proof either on the moving party or on the defendant.[4/] The

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4. Henry v. State, 647 S.W.2d 419, 426 (Ark. 1983); Ark.Code § 5-2-302; People v. Medina, supra, 51 Cal.3d 870, 799 P.2d 1282; California Penal Code § 1369(f); Gomez v. District Court 500 P.2d 134, 136 (Colo. 1972); Colo.Rev.Stat. Ann. § 16-8-111(2); Conn.Gen.Stat. § 54-56d(b); Flowers v. State, 353 So.2d 1259, 1260 (Fla.App. 1978); Wallace v. State 248 Ga. 255, 282 S.E.2d 325, 330, cert. den. 453 U.S. 927 (1981); State v. Aumann 265 N.W.2d 316, 319-320 (Iowa 1978); Mozee v. Commonwealth 769 S.W.2d 757, 758 (1989 Ky.); State v. Rogers 419 So.2d 840, 843 (La. 1982); L.S.C.A.CR.P. § 641; State v. Chapman 104 N.M. 324, 721 P.2d 392, 395 (1986); Miller v. State 751 P.2d 733 (Okla.Crim. 1988); Commonwealth v. Martinez 446 A.2d 899, 901 (Pa. 1982); Pa.Stat.Ann.Tit. 50 § 7403(a); Barber v. State 757 S.W.2d 359, 363 (Tex.Crim. 1988), cert. den. 489 U.S. 1091 (1989); Texas Code Art. 46.01 § 1(6); Va.Code Ann.

federal statute also places the burden of proof on the moving party. (28 U.S.C. § 4241; See also, Federal Government's Amicus Brief in Support of Respondent.)

Petitioner complains that California is among a minority of states that compel a defendant to prove competency for trial. Notably, no greater number of states place the burden of proof upon the prosecution as on the defendant. Only 14 states place the burden of proof on the party asserting competency or on the prosecution.[5/] The

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§ 19.2-169.1E.

5. Jones v. State (Alaska), 812 P.2d 613 (1991); Alaska Stats. § 12.47.100; Diaz v. State, 508 A.2d 861 (Del. 1986); Del.Stats. Art. 11 § 404; People v. Garlick, 360 N.E.2d 1121 (Ill.1978); Ill.Rev.Stat., ch. 38, § 104-11(c); Treece v. State, 313 Md. 665, 547 A.2d 1054, 1063 (1988); Commonwealth v. Crowley, 393 Mass. 393, 471 N.E.2d 353 (Mass.1984); State v. Bertrand, 465 A.2d 912 (N.H. 1983); State v. Otero, 570 A.2d 503 (N.J. 1986); State v. Von Braunsberg, 292 N.E.2d 303 (N.Y. 1972); State v. Heger, 326 N.W.2d 855, 858 (N.D. 1982); State v. Law, 244 S.E.2d 302, 308 (S.C. 1978); State v. Surface, 440 N.W.2d 746 (S.D. 1989); State v. Jones, 406 N.W.2d 366, 369 (S.D. 1987); State v.

remaining 22 states have made no allocation of a burden of proof either through legislation or judicial decision.[6/]

As this Court observed in Martin v. Ohio, supra, 480 U.S. at pp. 236-237, however, the relevant inquiry is what the Constitution requires, not what a majority of states have chosen to do.

Black, 815 S.W.2d 166, 174 (1991 Tenn.) Wis. Stat Ann. § 971.14(4) (1990); Loomer v. State 768 P.2d 1042, 1045 (Wyo. 1989).

6. Ariz. R. Cr. Pro., Rule 11.1 (1987); Haw. Rev. Stat. §704-405 (1985); Idaho Code §18-212 (1987); Ind. Code Ann. §35-36-3-1 (1986); Kan. Stat. Ann. §22-3302 (1988); Ky. Rev. Stats. Ann. §§ 504.100(3) (Michie 1990); Me. Rev. Stat. Ann. Tit .15 § 101-B (West Supp. 1990); Mich. Comp. Laws Ann. §330.2020 (West 1980); Miss. Code Ann. § 99-13-11 (1972); Mo. Rev. Stat. § 552.020(7) (Vernon 1987); Mont. Code Ann. § 46-14-221 (1989); Neb. Rev. Stat. Ann. § 29-1823 (1989); Nev. Rev. Stat. Ann. § 178.415 (1986); N.C. Gen. Stat. § 15A-1002 (1988); Or. Rev. Stat. § 161.370 (1990); R.I. Gen. Laws § 40.1-5.3-3(3) (1990); Utah Code Ann. § 77-15-5 (1990); Vt. Stat. Ann. Tit. 13 § 4817(b) (1974). See, Hensley v. State 575 NE.2d 1053, 1055-1056 (Ind.App. 1991). (Absence of allocation of burden of proof does not violate due process.)

C. A balancing of factors supports California's allocation of the burden of proof in competency to stand trial proceedings.

In a criminal prosecution, due process concerns arise only when the allocation of a burden of proof subjects the defendant to hardship or oppression. (Morrison v. California, 291 U.S. 82, 88-89 (1934).) In determining the propriety of a burden of proof allocation, a critical factor is the parties relative access to relevant information. (Id., at p. 89.)

1. The defendant's access to information and opportunity for knowledge clearly justify allocation of the burden of proof to defendants on the issue of mental competency to stand trial.

Given the relevant focus of a competency hearing, the defense clearly is in the better position to address the issue. A defense attorney's observations and opinion with respect to his client's competency may be very probative on the question of competency. It is the defense

counsel who will be aware of problems with communication or cooperation which may hamper the presentation of a defense. (Pizzi, *Competency to Stand Trial in Federal Courts: Concepts and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 58-59 (1977).) Indeed, the first hand evaluation of defense counsel "may be as valuable as an expert psychiatric opinion. . . ." United States v. David, 511 F.2d 355 (D.C. Cir. 1975); See also, United States ex rel. Roth v. Zelker, 455 F.2d 1105, 1108 (2nd Cir.) cert. den. 408 U.S. 927 (1972).

The defense attorney's knowledge of the particular case and his access to the defendant place him in the position of being able to derive the requisite information for a competency determination. Petitioner's argument ignores the practical problems intrinsic

in the prosecution marshalling evidence on the question of competency.

The prosecution's access to information from the defendant will be limited to compulsory psychiatric examinations. Ironically, petitioner assails the value of psychiatric experts, thereby undermining the value of the only basic sources of information available to the prosecution. It is the defense counsel who truly has access to the defendant in the context of the core issues to be resolved, i.e., the defendant's level of understanding of the particular case and ability to communicate with counsel.

Petitioner notes that it is a strange rule of law when a criminal defendant is required to prove his own incompetency, as the disability he would be attempting to establish would render him incapable of sustaining his burden of proof. (See,

People v. Bender, 20 Ill.2d 45, 169 N.E.2d 328, 332 (1960); accord United States v. DiGilio, 538 F.2d 972, 988 (3 Cir. 1976).) This argument cannot withstand scrutiny. When the focus of a competency hearing is considered with the fact a criminal defendant is represented by counsel, it is clear that a defendant is by no means incapable of sustaining a burden of proof.

Petitioner relies on United States v. DiGilio, supra, 538 F.2d 988 which held it is "contradictory to argue that a defendant who may be incompetent possesses sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." (See also, Bilyew v. Franzen, supra, 686 F.2d 1238 (7th Cir. 1982).) As the California Supreme Court observed:

> "[O]ne might reasonably expect that the defendant and his counsel would have better access than the People to the facts relevant to the court's

competency inquiry. Indeed, this analysis affords a satisfactory answer to Bilyew's (supra, 686 F.2d 1238) concern about the defendant's possible inability to cooperate with his counsel in establishing his incompetence: Counsel can readily attest to any such defect or disability. The People, on the other hand, have little or no access to information regarding the defendant's relationship with his counsel, or defendant's actual comprehension of the nature of the criminal proceedings." (People v. Medina, supra, 51 Cal.3d 870, 885; JA 99-100.)

In Bilyew v. Franzen, supra, 686 F.2d 1238 the federal Court of Appeals concurred with a line of Illinois state court decisions which declared a state statute placing the burden of proof of competency on a defendant unconsti-tutional. Bilyew asserted that

"There is little question that the Fourteenth Amendment requires the state or federal prosecution to shoulder the burden of proving the defendant is fit to stand trial once the issue of unfitness has been properly raised. [Fn. omitted.] Every court that has considered the issue has so held. [citations omitted]." (Id., at pp. 1244-1245.)

The absence of question perceived by Bilyew may be attributable to its failure to acknowledge existing contrary authority. As the California Supreme Court observed, there is "substantial authority" supporting a contrary view." (People v. Medina, supra, 50 Cal.3d at p. 883; JA 97.) As noted above, this Court upheld a state statute placing the burden of proof on a defendant to establish his own insanity, despite the possibility his mental condition might prevent an effective showing. (Leland v. Oregon, supra, 343 U.S. 790, 798-799, See, Martin v. Ohio, supra, 480 U.S. 228, 236.)

Irrespective of the defendant's mental condition, the allocation of the burden of proof upon the defense, does not violate "generally accepted concepts of basic standards of justice" and this Court should decline to interfere with a state's determination of policy. (See, Leland v.

Oregon, supra, at p. 799.) There is no hardship upon a defendant assessing and presenting evidence on competency to stand trial. (See Morrison v. California, supra, at pp. 88-89.)[7]

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7. Petitioner contends that the appropriate analysis is set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The factors in Mathews are not the appropriate focus for the question presented here.

This Court identified three factors in Mathews v. Eldridge to be considered in determining whether a specific procedural safeguard is mandated before the government can deprive an individual of a liberty or property interest. Mathews v. Eldridge, supra, 424 U.S. at p. 335. The factors Mathews balanced are (1) the private interest which will be affected by the official action being taken; (2) the degree of risk of an erroneous deprivation of that private interest through the procedures being used, contrasted with any probable value of added or substituted safeguards; and (3) the government's interest, as well as the added burdens any additional or substitute procedural requirements would entail. (Mathews v. Eldridge, supra, 424 U.S. 319, 335 (1976).)

Petitioner's right not to stand trial while mentally incompetent clearly constitutes a fundamental interest. (Drope v. Missouri, supra, 420 U.S. 162, 172 (1975).) So, the first factor of a Mathews analysis is not even in question. The second prong of Mathews encompasses

California's policy determination as to the burden of proof is well founded. The competency proceeding concerns the defendant's ability to interact with his attorney and his understanding of the criminal proceedings pending against him. (Drope v. Missouri, supra, 420 U.S. 162, 171-172.) The defendant and his counsel clearly are in a better position than the prosecution to put forward relevant evidence on these points.

If petitioner's concern over a possibly mentally ill defendant being required to show his incompetency is valid, the next step would be to require

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the ultimate issue in this case, e.g., the proper allocation of proof among the parties. The third prong addresses fiscal and administrative burdens which is relevant to the types of entitlements addressed by Mathews, i.e., social security benefits, but not a focus for determining the allocation of burden of proof in a competency hearing. Morrison v. California, supra, sets forth the appropriate framework for a due process analysis.

an affirmative finding of mental competence as a prerequisite to participating in a competence hearing. The fact that petitioner is represented by counsel, and the duties and obligations of the judge, defense attorney, and prosecutor to raise the issue of competency at any point in criminal proceedings, adequately safeguards the defendant.

Petitioner's attempt to translate the fallibility of psychiatric diagnosis into a basis for requiring the prosecution to shoulder the burden of proof on the question of competency necessarily fails. A question of fallibility would counsel against compelling the prosecution to prove competency of criminal defendants. Psychiatric testimony may represent the prosecution's sole information on the question of competency.

Moreover, a very real possibility of abuse is present in motions for a competency hearing. The defense may be using the process to effect a delay in the proceedings, which enures to the defendant's benefit. (Wexler & Scoville, *Incompetency to Stand Trial*, 13 Ariz.L.Rev. 160, 161-162.)

Professional publications advising psychiatric experts to be alert for signs of malingering are interpreted by petitioner as a basis for concluding there is a significant risk of error in competency proceedings. In reality, the authority cited by petitioner illustrates the gross potential for abuse of the system by feigned claims of mental incompetency.[8/]

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8. Dr. Gold acknowledged a study at Stanford University by Dr. Rosenhan entitled, "Being Sane and Insane Places." (II RT 435.) Eight people including three psychologists and a pediatrician, went to psychiatric hospitals seeking admission by claiming they were hearing voices. (II RT

Petitioner complains it is unconstitutional to compel a defendant to stand trial when the evidence is in equipoise on the question of mental competence. This argument ignores the nature of the determination being made. First, if a defendant cannot meet the minimal showing demanded by preponderance of the evidence, it is fitting that he proceed to trial.

Further, unlike guilt and innocence, mental competence is presented on a continuum. Therefore, in a case with the evidence in equipoise, the defendant is

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436.) After feigning mental illness, all eight were admitted and retained for a minimum of one week, and one remained hospitalized for 52 days. (II RT 438.)

A follow-up of the study evolved when a doctor challenged the author to send feigning patients to him. The doctor identified approximately 30 patients as attempting to fool him, when in reality no one had attempted to gain admission in response to the doctor's challenge. (II RT 439.)

clearly not on the upper range of the continuum of incompetence.

Moreover, once a defendant is found guilty, the inquiry ends. In contrast, after a defendant is found competent, the trial court, prosecutor, and defense attorney have a continuing obligation to raise the issue of incompetency throughout the proceeding. Accordingly, the image of a madman unjustly condemned to proceed to verdict is unfair and not possible given the myriad of procedural protections afforded defendants on the issue of mental competency in California.

The requirement of the prosecution proving guilt beyond a reasonable doubt is designed to increase the respect and confidence of the community in the moral force of the criminal law. (In re Winship, supra, 397 U.S. 358, 363-364.) Increasing the opportunity for error favoring defendants on the issue of mental

competency would hardly have such a salutary effect.

In reality petitioner is suggesting that should the jury regard his behavior as a mere manipulation of the system, he should still prevail on his claim of incompetency by virtue of placing the burden of proof on the prosecution. The constitution does not compel such a result.

2. <u>Any error was harmless beyond a reasonable doubt</u>

Only one of the three experts evaluating petitioner believed him to be incompetent. The true disagreement surrounding petitioner is whether he is actually a schizophrenic. As Dr. Pierce pointed out, however, schizophrenics can be mentally competent to stand trial.

The lone expert favoring petitioner's incompetence ignored the facts and circumstances of his crime spree, simply stating that petitioner is incompetent

because he cannot remember why he is charged with murder. Given the evidence presented below, any error of a constitutional magnitude would be harmless beyond a reasonable doubt. (Chapman v. California 386 U.S. 18 (1967)

II.

PETITIONER'S RIGHT TO DUE PROCESS WAS NOT ABRIDGED WHEN THE JURY WAS INSTRUCTED HE "IS PRESUMED" COMPETENT UNLESS A PREPONDERANCE OF EVIDENCE SHOWS INCOMPETENCE

Petitioner also contends that instruction of the jury below to presume he was mentally competent violated his right to due process because such a presumption is irrational and the jury improperly gave evidentiary weight to the presumption. This argument ignores the fact the "presumption" in question is not technically a presumption, rather it is merely a restatement of the allocation of the burden of proof on the question of mental competency. If the presumption

employed below is anything other than a restatement of the allocation of the burden of proof, this Court should decline to consider petitioner's challenge to the use of the presumption.[9/] Finally, California's presumption that a criminal defendant is mentally competent to stand

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9. It is well settled that where an issue is not explicitly raised below and not decided by the state court, there is a "weighty presumption" against review by this Court. (Heath v. Alabama, 474 U.S. 82, 87 (1985)). Petitioner's due process challenge below, and the California Supreme Court's decision, focused solely on the propriety of the allocation of the burden of proof to a criminal defendant. (JA 93-105.)

While the question on which review was granted in this case included a reference to the fact that California law contains a presumption of competence, the focus of the question was solely the allocation of the burden of proof. Indeed, petitioner's argument in support of his petition for writ of certiorari never referenced the argument now being raised in the brief on the merits. Pursuant to Rule 24.1(a) of the rules of this Court, this argument should not be considered on the merits, if anything other than the restatement of the allocation of the burden of proof is involved, as the argument would then represent a change in the substance of the question presented.

trial is rational and therefore constitutional.

The instruction defines preponderance and tells the jury a defendant must show his incompetence by a preponderance. It is nothing more than a restatement of the allocation of the burden of proof on the issue before the jury. (JA 87.)

The "presumption" of competency is not technically a presumption for purposes of analysis. As this Court observed in Taylor v. Kentucky, 436 U.S. 478, 483-486 (1978), the presumption of innocence is not technically a presumption, rather it is a restatement of the prosecution's burden of proving a defendant's guilt beyond a reasonable doubt.

The same basis underlies both presumptions. Most people in society are mentally competent and innocent of criminal activity. Another "presumption" of this type is that most people are sane

at the time of the commission of an offense. The trier of fact generally starts with the premise of what is normal and the abnormal is established by sufficient evidence to the contrary.

Petitioner argues there should be no presumption of mental competency after a trial judge has formally declared a doubt by ordering the competency hearing. Relying on the "prima facie" showing which gave rise to the competency hearing, petitioner concludes any presumption of competency is irrational after that time. Petitioner would never suggest, however, that a presumption of innocence is irrational following a defendant being bound over for trial after a preliminary hearing.

The presumption of innocence serves to remind jurors that the determination of guilt is to made by them. Clearly, it is rational to infer a greater likelihood of

guilt once a criminal defendant has been bound over for trial. Probabilities, however, do not alter the allocation of burden of proof which has been established. The same remains true of a competency determination. The issue is to be resolved by the jury, and a restatement of that fact in a "presumption" of competency does not alter that fact and does not give rise to an irrational presumption.

CONCLUSION

For the foregoing reasons,

California's allocation of burden of proof

in competency hearings is constitutional.

Dated: January 2, 1992.

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TEOFILO MEDINA, JR.

Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within BRIEF ON THE MERITS as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 2nd day of January, 1992.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, January 2, 1992.

Arlene M. Ryan
ARLENE RYAN

Subscribed and sworn to before me
this 2nd day of January, 1992.

Anne Marie Boyd
Notary Public in and for said County and State

ANNE MARIE BOYD
Notary Public—California
County of San Diego
My Commission Expires 11, 10 92

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Supreme Court, U.S.
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No. 90-8370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,
Petitioner,

v.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. IMPOSING THE BURDEN OF PROVING INCOMPETENCE TO STAND TRIAL UPON A DEFENDANT WHOSE COMPETENCE IS IN DOUBT VIOLATES DUE PROCESS OF LAW

A. Introduction

In the opening brief, petitioner demonstrated that imposing the ultimate burden of proving incompetence upon a criminal defendant, in a proceeding which is held only if the trial court has a "bona fide doubt" as to his or her competence, is inconsistent with due process of law under the Fourteenth Amendment. Only a finding—by the greater weight of the evidence—that a defendant is competent to stand trial will satisfy due process and ensure that the protection afforded by this Court's decisions in *Drope v. Missouri*, 420 U.S. 162 (1975), *Pate v. Robinson*, 383 U.S. 375, 385 (1966), and *Dusky v. United States*, 362 U.S. 402 (1960) is realized. ABA *Criminal Justice Mental Health Standards*, Standard 7-4.8(c)(ii) (1989 rev.).

Preliminarily, many of the arguments made by respondent and amici curiae in support of respondent confuse the considerations applicable to the initial burden of producing evidence of incompetence, in order to entitle the defendant to a hearing on the issue, with the considerations involved in the ultimate burden of persuasion once such a hearing has been found to be necessary. No jurisdiction requires that a hearing on the defendant's competence be held "on demand", *State v. Janice*, 20 Conn.App. 212, 565 A.2d 553, 554 (1989), nor does petitioner argue that such a rule is mandated by due process. Petitioner has no quarrel with the presumption of competence which obtains before a trial court declares a bona fide doubt as to the defendant's competence; but once that doubt has been declared, the analytical landscape changes dramatically. *See* Amicus Curiae Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York (CLP), Br. at 2-3, 18-24. The

due process analysis under *Mathews v. Eldridge*, 424 U.S. 315, 335 (1976) must focus on the situation presented at the time the competence determination is made, not on the situation before any prima facie case of incompetence has been found. We will turn to that analysis after disposing of three broad contentions made by the state.

B. Due Process Requires the State to Bear the Burden of Proof On Issues Other Than the Elements of a Criminal Offense

Respondent argues that "[t]he state only carries the burden of proof when it must prove the elements of a crime." Resp. Br. at 23 (citations omitted). This is patently incorrect: the state is constitutionally required to bear the burden of proof on a number of issues which do not involve elements of a criminal offense. *E.g., Colorado v. Connelly*, 479 U.S. 157, 167-169 (1986) (waiver of *Miranda* rights); *Lego v. Twomey*, 404 U.S. 477, 488 (1972) (voluntariness of defendant's statements); *United States v. Matlock*, 415 U.S. 164, 171-172 (1974) (voluntariness of a consent to search); *Nix v. Williams*, 467 U.S. 431, 444 n. 5 (1984) (inevitable discovery of illegally-seized evidence); *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986) (existence of factors in aggravation of sentence); *Chapman v. California*, 386 U.S. 18, 23-24 (1967) (state must prove harmlessness of constitutional error beyond a reasonable doubt).

These issues "have no necessary relationship to the elements of the crime," Resp. Br. at 20-21, but the Constitution nevertheless imposes the burden of proof on the state, as it does in a number of civil contexts in which an individual may be deprived of a fundamental liberty interest in the absence of any criminal sanction. *E.g., Addington v. Texas*, 441 U.S. 419 (1979) (civil commitment); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights). Constitutional values, even if they are unrelated to establishing the elements of a criminal offense, may require the state to bear the burden of proof on critical issues when it is necessary to protect

those values. *Lego v. Twomey, supra*, 404 U.S. at 486; *see United States v. Raddatz*, 447 U.S. 667, 678 (1980) (and cases cited therein). Respondent's argument finds no support in this Court's precedents.

C. The Due Process Analysis Is Not Controlled By Cases Dealing With Affirmative Defenses

Respondent and amici curiae argue that disposition of this issue is controlled by this Court's precedents permitting the burden of proof of affirmative defenses to be placed on the defendant. *E.g., Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Leland v. Oregon*, 343 U.S. 790 (1952). The substance of this argument ignores this Court's explicit recognition that the defendant's sanity at the time of the offense and competence at the time of trial are entirely distinct issues. *Jackson v. Indiana*, 406 U.S. 715, 739 (1972); *Drope v. Missouri, supra*, 420 U.S. at 176-177. Examination of the actual factors in issue in these two situations makes clear that the due process balance is not the same and respondent's argument assuming that they are equivalent is inaccurate.

The Solicitor General attempts to draw an analogy between the defendant's fundamental right not to be tried unless he is competent and the "compelling interest in not convicting persons who are insane" U.S. Br. at 20, in order to suggest that the constitutionality of placing the burden of proof on the defendant to establish the affirmative defense of insanity, upheld in *Leland v. Oregon*, should control the result here. The Solicitor General's treatment of the *Mathews* factors in this argument betrays a basic confusion as to the fundamental distinction between competence and the affirmative defense of insanity. A finding of incompetence generally results in only a temporary delay of criminal proceedings, and thus does not permanently affect the state's fundamental interest in prosecution. *Jackson v. Indiana, supra*, 406 U.S. at 738; *see below* at 10. By contrast, a finding of insanity results in complete exculpation for the criminal offense

and requires release of the defendant as soon as sanity is restored. Thus the stakes, with respect to the state's legitimate interests, are much higher in the sanity context.

The risk of error analysis is also different. Litigation of the affirmative defense of insanity presupposes a competent defendant, fully able to cooperate rationally with counsel in preparing and presenting evidence of a past mental state, and thus capable of "bear[ing] the laboring oar" on that issue. *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring). Litigation over competency, however, presupposes a defendant with a mental impairment, sufficient to establish a prima facie case of incompetence. That situation presents a significant danger that the defendant's disorder will interfere with his or her ability to demonstrate incompetence. In this case, for instance, Dr. Pierce thought that the defendant's difficulty in cooperating with counsel and his expert examiners was itself a product of his mental disorder. JA 61-67. Thus the ability of the parties to litigate the issue is significantly different in the two contexts.

Finally, the character of the defendant's interest is different. The defendant has a clear, fundamental right not to be tried if he or she is not competent. The character of a defendant's right to complete exculpation of a criminal offense is to some degree dependent upon the state's recognition, under its substantive criminal law, of affirmative defenses. *See Patterson v. New York*, *supra*, 432 U.S. at 207-210; *Mullaney v. Wilbur*, *supra*, 421 U.S. at 705-706 (Rehnquist, J., concurring). Thus a defendant's interest in establishing an affirmative defense, while admittedly strong, is not of the same unequivocal force as the interest in the fundamental fairness of the trial, to which the defendant's competence is a "condition precedent." *United States v. Muncaster*, 345 F.Supp. 970, 973 (M.D. Ala. 1972), *affirmed*, 472 F.2d 1407 (5th Cir.), *cert. denied*, 412 U.S. 963 (1973). Because of these

fundamental differences, the attempt of respondent and amicus curiae to conflate the distinct analyses of the issues cannot succeed. *See e.g., State v. Bertrand*, 123 N.H. 719, 465 A.2d 912, 916 (1983).

D. The Due Process Analysis Prescribed in *Mathews v. Eldridge* Applies To This Case

Respondent also contends that the general structure for due process analysis established in *Mathews v. Eldridge*, and applied in numerous other cases, should not be employed in this situation, Resp. Br. at 37; and amicus CJLF argues that it should not be used in criminal cases at all. CJLF Br. at 9-11. This Court has explicitly recognized that the *Mathews* test is the "general approach for testing challenged state procedures under a due process claim," *Parham v. J.R.*, 442 U.S. 584, 599 (1979), and the test has been employed, without dissent as to its applicability, in analyzing issues in criminal cases in *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) and *United States v. Raddatz*, *supra*, 447 U.S. at 677.[1] The *Mathews* test establishes a structure for the rational analysis and application of the principles enunciated in earlier cases—the necessity for avoiding "hardship or oppression" or "injustice" to the accused in the placement of the burden of proof, *Morrison v. California*, 291 U.S. 82, 88-89, 96 (1934)—which is applicable to the issue of the imposition of the burden of proof on the defendant here. *See Speiser v. Randall*, 357 U.S. 513, 523 (1958) (applying due process test to imposition of burden of proof to show loyalty to government upon claimant of tax relief).

Respndent contends nevertheless that the appropriate analysis is the test of comparative convenience of access

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[1] *See also Burns v. United States*, 501 U.S. ——, 111 S.Ct. 2182, 115 L.Ed.2d 123, 139-140 (1991) (Souter, J., dissenting) ("The *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest, and . . . *Mathews* provides the right framework for the analysis [of the criminal sentencing issue] here as well.").

to evidence applied in *Morrison v. California*, 291 U.S. 82 (1934). This Court has recognized, however, that an analysis of the constitutionality of placing a burden of proof on a defendant because of the defendant's superior knowledge of the fact in issue, "which closely resembles the test of comparative convenience in the production of evidence, was implicitly disapproved in *Tot v. United States*, 319 U.S. 463 (1943)." *Leary v. United States*, 395 U.S. 6, 45 (1968). It is therefore doubtful whether the *Morrison* test, as such, retains constitutional validity. *See* Note, *The Burden of Proving Competence To Stand Trial: Due Process at the Limits of Adversarial Justice*, 45 Vand.L.Rev. 199, 223 (1992).

But even to the extent that the *Morrison* convenience test may be viewed as subsumed in the *Mathews* analysis —as part of the consideration of the cost of placing the burden of proof on the state—this Court's actual decision in *Morrison* supports petitioner. In *Morrison*, a state statute made possession of agricultural land by aliens illegal and placed the burden on the defendant to prove that he was not a member of a racial minority which rendered the defendant ineligible for citizenship. This Court reasoned that "[i]n the vast majority of cases" there would be no dispute because the race of the defendant would be obvious, and that "[t]he only situation in which the shifting of the burden can be of any substantial profit to the state" is when the question is a difficult one because the defendant is of mixed racial origin. The imposition of the burden of proof upon the defendant was therefore held impermissible under the due process clause, because the defendant might be unaware of his origins, and thus imposing the burden on him "may result in grave injustice in the only class of cases in which it will be of any practical importance." *Id.* at 96.

This Court's reasoning in *Morrison* finds an exact parallel in this situation. Petitioner has shown, and neither respondent nor amici curiae deny, that in the vast majority of cases no issue as to the defendant's competence

is ever raised, or, if it is raised, it is resolved without dispute. Pet. Br. at 30-31. It is only when the question of competence is a close and difficult one that the burden of proof assumes any importance at all. In those cases, the defendant, who must have been found to be of questionable competence in order to be entitled to a hearing in the first instance, is likely to be hampered in his ability to persuade the jury of his incompetence by the very mental impairment in issue. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 246 (1972); *United States v. Hemsi*, 901 F.2d 293, 295-296 (2d Cir. 1990) (defendant's disruptions of trial could not justify removal from courtroom if they were themselves the product of mental disease or defect); *Fitch v. Estelle*, 587 F.2d 773, 776 (5th Cir.), *cert. denied*, 444 U.S. 881 (1979) (questioning reliability of apparently incompetent defendant's own assertions as to capacity). Thus, just as in *Morrison*, imposing the burden of proof on the defendant "may result in grave injustice in the only class of cases in which it will be of any practical importance."

E. Application of the *Mathews v. Eldridge* Factors Requires the Conclusion That Imposing the Burden of Proof on the Defendant Violates Due Process

The *Mathews* test provides the appropriate framework for analysis of the issue presented here, and we therefore turn to consideration of the three factors—the individual's interest, the state's interest (including the cost of the additional safeguards proposed), and the risk of error in the proceeding—involved in that test.

The first factor of the *Mathews* test clearly weighs in favor of petitioner's position. Respondent concedes that a criminal defendant's interest in being tried only if he or she is competent is a fundamental one. Resp. Br. at 37 n. 7. This Court's precedents make it clear that the competence of the defendant is absolutely necessary to the fundamental fairness of a criminal trial, and therefore to the validity and reliability of any resulting conviction and sentence. Unlike a mere erroneous evidentiary rul-

ing or instruction, a defendant's incompetence infects the entire trial process. *Cf. Arizona v. Fulminante*, 499 U.S. ——, 111 S.Ct. 1246, 113 L.Ed.2d 302, 331 (1991). While an erroneous determination of competence may not absolutely ensure a conviction, it does seriously hamper the defendant's ability to provide necessary cooperation to counsel; and on strategic questions where the party must make a personal decision among available alternatives, a defendant who is not competent is likely to make an irrational choice which dooms his or her case,[2] and an erroneous determination certainly upsets the assumptions underlying other rules which bind criminal defendants. *See McCleskey v. Zant*, 499 U.S. ——, 111 S.Ct. 1454, 113 L.Ed.2d 517, 547-548 (1991) (procedural default for failure to raise issue in first federal habeas corpus petition justified in light of defendant's personal knowledge of facts giving rise to claim).

Amicus suggests that the strength of the defendant's fundamental interest in being tried only if he or she is competent is somehow diminished because an erroneous finding of incompetence results in the defendant's hospitalization and, possibly, treatment including involuntary medication. U.S. Br. at 24-26. This argument has no force here: petitioner was incarcerated prior to trial, and was receiving medication for his mental state prior to and during trial, and at no time did petitioner object to a finding of incompetence. RT 231-232, 678-685. In addition, California law provides for incompetence commitments to be made to the least restrictive setting appropriate, Cal. Pen. Code, § 1370, subd. (a)(1-3, 5) (West Supp. 1991); and involuntary medication is nowhere required as part of such a commitment. Moreover, incompetence commitments are normally very brief, *see below* at 10; and any imposition on a defendant's rights in this regard will be temporary and reversible, in contrast to the virtually permanent damage to a defendant's right to a fair trial and reliable sentence which results from an erroneous finding of competence.

[2] In this case, the defendant irrationally insisted upon reentry of a plea of not guilty by reason of insanity, despite warnings from counsel and the trial court that, strategically, proceeding with a trial of sanity would "destroy" the penalty phase presentation. RT 5991, 5995-6003. Since the defendant did not suggest any rationale for insisting on reentering the plea after he had withdrawn it, and there is no indication that the defendant was deliberately seeking a death sentence, it is highly likely that the decision directly resulted from an erroneous determination that he was competent. *See United States v. Hemsi, supra*, 901 F.2d at 295-296 (counsel's recognition that defendant would not be able to make "judgment calls" in case supported finding of incompetence).

The second *Mathews* factor, the risk of an erroneous determination, is significant. The determination of competence is largely dependent upon psychiatric and psychological expert testimony and is therefore fraught with potential for error, as this Court has repeatedly recognized. *E.g., Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). Petitioner has also identified other specific factors increasing the risk of error: the complexity of the competence determination; the effect of the defendant's mental impairment itself upon his or her ability to cooperate and assist in demonstrating his or her own capacity; the reflexive official suspicion of claims of incompetence; and the injection into the jury's deliberations of an irrational instruction to presume that the defendant is competent, despite the fact that a competence hearing is held only after a prima facie showing of the defendant's incompetence has been found. With the exception of its argument as to the presumption instruction, respondent does not dispute petitioner's contentions on this point.[3]

[3] Amicus curiae suggests the possibility that defendants facing severe sentences may claim incompetence to avoid trial, and thus that suspicion toward such claims does not deform the competence determination. U.S. Br. at 23 n.19. The expert testimony in this case, however, indicated no correlation between the seriousness of the charged offense and the incidence of malingering. JA 65-66. Further, the primary defense against false claims of incompetence is the initial stage at which the trial court must find a bona fide doubt as to the defendant's competence. There is no logical correlation between the ultimate burden of persuasion on the issue of

The third *Mathews* factor, the state's interest, is clearly less compelling than the defendant's. While the state has, of course, a strong interest in prosecuting criminal offenses, it has no legitimate interest in trying a defendant who is not competent. The increase in the accuracy and reliability of the determination which would result from requiring that competence be demonstrated by the greater weight of the evidence would therefore inure to the benefit of the state as well. *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (state shares interest in accurate and just decision in termination of parental rights).

Further, any interference with the state's interest in trying the defendant which results from a finding of incompetence is necessarily limited. Under *Jackson v. Indiana*, *supra*, 406 U.S. 715, the state is constitutionally prohibited from holding the defendant longer than is necessary to restore competence or determine if he will regain competence in the reasonably foreseeable future. *See* Cal. Pen. Code, § 1370, subd. (a)(2), (b)(1-2), (c)(1) (West Supp. 1991) (limiting total duration of incompetence commitment and providing for evaluation reports within 15 days after commitment and regularly thereafter). Moreover, as petitioner explained in the opening brief, in practice the duration of incompetence commitments is very short. Pet. Br. at 33-35. Neither respondent, nor amici curiae in support of respondent, questions or disputes the information cited by petitioner that the overwhelming majority of individuals committed as incompetent are returned for trial quickly.

The other component of the state's interest is the cost of the additional safeguard. Neither respondent nor amici curiae identifies any concrete evidence that placing the burden of proof on the state would cause any increased cost or dislocation of any sort.[4] Nor does respond-

competence and the number of cases in which a hearing on the issue of competence is found to be necessary.

[4] Numerous states allocate the burden to the prosecution, but there is nothing to suggest that the experience of these states demon-

ent discuss the factors cited by petitioner which demonstrate that the prosecution has ample access to evidence of the defendant's condition, specifically the greater access to, and opportunity for observation of, an in-custody defendant by the prosecution, the equal availability of the expert opinions on the issue, or the equal availability of evidence from third parties. Pet. Br. at 32.

Instead, respondent focuses almost entirely upon defense counsel's supposedly greater knowledge of the defendant's mental condition. Whatever force this argument may have at the stage of the initial burden of production, when defense counsel may be the first to realize that the defendant cannot participate rationally in the proceedings, it has none once a doubt as to competence has been declared and evidence must be adduced at a hearing.[5] The primary evidence of the character and extent of the defendant's mental disorder are the expert reports, which are as available to the prosecutor as to defense counsel. Further, any information defense counsel has as to the defendant's ability to communicate or to participate in the proceedings to the extent required by *Drope*, *Pate*, and *Dusky* is also as available to the

strates an untoward cost from that rule. *See Santosky v. Kramer*, *supra*, 455 U.S. at 767 (no evidence of effect on "speed, form, or cost" of proceedings in states adopting clear and convincing evidence standard for termination of parental rights); *United States v. Turner*, 602 F.Supp. 1295, 1313 (S.D.N.Y. 1985) (finding government proved defendant's competence by preponderance of evidence).

[5] Respondent's insistence that defense counsel has a monopoly upon access to information relevant to the defendant's competence is also inconsistent with the actual practices of courts. At the initial stage of producing evidence of incompetence, in order to justify a competence hearing, defense counsel may be the first to recognize the defendant's incapacity. Courts often deny competence hearings, however, in the face of positive assertions by counsel that the defendant is incapable of proceeding. *E.g.*, *People v. Stewart*, 89 Cal. App.3d 992, 996-997, 153 Cal.Rptr. 242 (1979); *United States ex rel. Foster v. DeRobertis*, 714 F.2d 1007, 1011-1012 (7th Cir. 1984).

prosecutor as to defense counsel, since that evidence is not shielded by any privilege. *Darrow v. Gunn*, 594 F.2d 767, 774 (9th Cir. 1974); *United States v. Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964).[6] Once a bona fide doubt as to competence has arisen, the court has the obligation to resolve the issue, which includes the power to compel psychiatric examinations and the cooperation of defense counsel in the inquiry. *E.g., Estelle v. Smith*, 451 U.S. 454, 465, 468-469 (1979); *see CLP Br.* at 14-15.[7]

Accurate analysis of the relevant factors in the *Mathews* test thus leads to the conclusion that the burden of proof of incompetence cannot constitutionally be imposed upon the defendant. This conclusion is consistent with the evidence of historical practice on this issue.

F. The Historical Evidence Is Consistent With Petitioner's Position

Amici curiae supporting respondent devote considerable argument to the issue of the British practice at the time the Constitution was adopted. As petitioner has acknowledged, the placement of the burden of proof at that period

[6] In this case, for instance, the defense investigator testified about his contacts with the defendant, JA 82-84, and defense counsel gave the court and the prosecution information about the defendant's statements following one of his outbursts during the competence hearing. RT 730, 736; *see also* RT 699. Nothing in the record suggests that the prosecution in this case had any difficulty obtaining evidence about the defendant. In fact, at trial some of the most significant evidence introduced by the prosecution was obtained from a member of petitioner's family. RT 5176, 5214-5217.

[7] The cases cited by respondent on this issue, *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975), and *United States ex rel. Roth v. Zelker*, 455 F.2d 1105, 1108 (2d Cir.), cert. denied, 408 U.S. 927 (1972), in fact illustrate petitioner's point. In both of those cases, the court indicated that defense counsel's testimony was or would have been probative on the issue of competence, and it was considered accessible to the trial court in its resolution of the competence issue. This is inconsistent with the theory that only the defense has adequate access to the crucial evidence on the question.

is not absolutely clear; but what is clear is that there was no such unequivocal historical support for placing the burden of proving incompetence upon the defendant as existed at common law for the burden of proving affirmative defenses. *Cf. Patterson v. New York*, 432 U.S. 197, 202 (1977); *Leland v. Oregon*, 343 U.S. 790, 798 (1952). Thus it cannot be argued that petitioner's due process claim is so at odds with traditional practice that it carries an additional burden of justification. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 121-130 (1989) (plurality opn.).

Moreover, contrary to the contentions of amici, the early case law in fact supports petitioner's argument. The case closest in time to the adoption of the Constitution on the specific issue held that, once the question of competence was placed in issue, the prosecution bore the burden of proving capacity to stand trial. *Ley's Case*, 1 Lewin 239, 168 Eng.R. 1026 (1828). In a case dealing with muteness, immediately prior to the adoption of the Constitution, the burden was placed upon the prosecution to establish capacity to stand trial, once it was determined that the defendant was mute due to a physical condition and not merely recalcitrant. *The King v. Steel*, 1 Leach 451, 168 Eng.R. 328 (1787). This is analogous to the current procedure, under which a bona fide doubt as to the defendant's competence, based upon a mental disorder, must be declared before the issue of the defendant's competence is tried, and it was the view accepted in the earliest federal cases on the subject. *United States v. Chisolm*, 149 F. 284, 289-290 (S.D. Ala. 1906); *see United States v. Lancaster*, 7 Bissel's Rpts. 440, 444, 26 Fed. Cas. 852, 854 (C.C.N.D. Ill. 1877).[8]

[8] The relevance of the historical record is limited by the fact that questions such as burden of proof and shifting burdens of persuasion—as well as critical distinctions between the burden of production and the burden of persuasion—were not typically made by courts and commentators of the eighteenth and early nineteenth century. At that period, jury instructions on the law were deemed merely advisory, as the jury was thought to have ultimate power to

G. The Weight of Current Authority Supports Petitioner's Position That Placing the Burden of Proof on the Defendant Is Constitutionally Impermissible

Petitioner's position is also in accord with well-reasoned current practice among the states, as reflected in the decisions analyzing the issue. Despite the fact that the issue of sanity at the time of the offense and competence at the time of trial are distinct questions, every court decision which has rejected the consitutional argument presented here has done so on the basis of the false equivalency of the two issues.[9] By contrast, every decision which has avoided the trap of confusing the two distinct issues has

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decide both the law and the facts, Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Column. L. Rev. 1369, 1429 n.258 (1991), citing, *e.g.*, Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 590-596 (1939); *compare Sparf v. United States*, 156 U.S. 51 (1895), *with id.* at 110 (Gray, J., dissenting); "and thus, the jury itself determined the proper standard of persuasion." Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L.Rev. 507, 524 (1975) (fn. omitted). Another major barrier to development of uniform rules as to burden of persuasion was the extremely limited availability of appellate review of convictions. "The inability to appeal a conviction based upon the use of an allegedly erroneous standard of persuasion prevented appellate courts from even considering what the proper standard should have been." *Id.* at 527.

Moreover, historical evidence suggests that the English practice of placing the burden of proving defenses on the defendant came from a misunderstanding of the issue of burden of persuasion. The Blackstonian rule on the issue resulted from a confusion of the burden of persuasion and the burden of production; and the American adoption of that rule—by Chief Justice Shaw in *Commonwealth v. York*, 50 Mass. (9 Metc.) 93 (1845)—similarly failed to confront the critical distinction between burdens of persuasion and production, an error which "continues to affect the course of American law." Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 902-910 (1968).

[9] *Lowenfield v. Phelps*, 817 F.2d 285, 294 (5th Cir. 1987), *affirmed on unrelated grounds*, 484 U.S. 231 (1988); *Wallace v. State*, 248 Ga. 255, 282 S.E. 2d 325, 330, *cert. denied*, 453 U.S. 927 (1981); *State v. Aumann*, 265 N.W.2d 316, 319-320 (Iowa 1978).

ruled in favor of petitioner's position.[10] Thus the weight of reasoned authority among state jurisdictions—authority which takes seriously this Court's recognition of the distinctions between sanity and competence, and which applies this Court's due process precedents with a regard for the specific situation involved—supports petitioner's argument.[11]

H. The Error In Imposing the Burden of Proving Incompetence Upon Petitioner Cannot Be Considered Harmless

Respondent finally claims that any error in instructing the jury on the burden of proof was harmless beyond a

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[10] *E.g., United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1978); *People v. McCullum*, 66 Ill.2d 306, 362 N.E.2d 307 (1977); *State v. Bertrand, supra*, 465 A.2d 912; *State v. Jones*, 406 N.W.2d 366, 370 (S.D. 1987); *see United States v. Makris*, 535 F.2d 899, 905-906 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

[11] Amici curiae refer to the enactment of the current federal statute, which requires a finding of incompetence by a preponderance of the evidence, 18 U.S.C. § 4241(d), as evidence that placing the burden of proving incompetence on the defendant complies with due process. CJLF Br. at 16-17; U.S. Br. at 10-11. Years before this enactment, however, every federal court which had reached the question held that imposition of the burden of proving incompetence upon the defendant was impermissible as a matter of due process of law. *E.g., United States v. DiGilio, supra*, 538 F.2d at 988 (3d Cir. 1976); *United States v. Makris, supra*, 535 F.2d at 906. The legislative history of the federal statute cited by amici does not contain a single reference to these authorities and devotes no analysis at all to the burden of proof question. S. Rep. No. 225, 98th Cong., 1st Sess. at 236, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3418. Rather, the legislative history and the statute as a whole focus upon the defense of insanity: the statute itself is included in the "Insanity Defense Reform Act"; and the legislative history stating the need for the enactment is concerned entirely with the insanity defense. S. Rep. No. 225, 98th Cong., 1st Sess. at 191-192, reprinted in 1984 U.S. Code Cong. & Admin. News at 3404-3405. Thus the federal statute on this issue suffers from the same confusion between the affirmative defense of insanity and the competence of the defendant at trial which infects all of the judicial authorities which reject petitioner's position. Pizzi, *Competence to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi.L.Rev. 21, 37-38 (1977).

reasonable doubt. Resp. Br. at 43-44. The California Supreme Court did not reach the issue of prejudice, JA 100-101, and the normal procedure would be to remand the case for that determination. *E.g., Yates v. Evatt*, 500 U.S. ——, 111 S.Ct. 1884, 114 L.Ed.2d 432, 451 (1911). Under the circumstances presented here, the only possible conclusion is that the error in imposing the burden of proof on the defendant was prejudicial, and this Court cannot dispose of the case on the ground that any error was harmless. *See Rogers v. Richmond*, 365 U.S. 534, 546-547 (1961).

There can be no dispute that the expert opinions of the defendant's competence were sharply divided. Dr. Gold was convinced that the defendant was incompetent. JA 22, 27-29, 30.[12] Dr. Sharma believed that the defendant was competent, although he acknowledged that an expert with Dr. Gold's experience with the defendant was in a better position to form an opinion. JA 55. While Dr. Pierce's opinion was that the defendant was competent, despite his paranoid schizophrenia, Pierce's testimony was that the defendant could and would assist counsel only to the extent he was able, JA 68; and his apparent lapses of attention (which were consistent with his having hallucinations), JA 53-55, 61-62, 71, were also consistent with a finding of incompetence. *See United States v. Hemsi, supra*, 901 F.2d at 295. The lay testimony was also divided. JA 11-14, 15, 77, 79-80, 83 . In addition, the jury was instructed on the burden of proof twice, during voir dire and before deliberations, JA 4-5, 86-87, and the prosecutor strongly emphasized the burden of proof both during voir dire of the jurors and in closing argument, JA 5-6, 85-86.

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[12] Respondent attacks Dr. Gold's opinion because he did not base it upon the facts of the charged offenses. Resp. Br. at 43. Here again, respondent confuses mental state at the time of the offense with competence at the time of trial, which are quite distinct inquiries. *Drope v. Missouri, supra*, 420 U.S. at 176-177; *see People v. Grant*, 45 Cal.3d 829, 755 P.2d 894, 912 (1988) (facts of offense did not give rise to doubt as to competence at trial).

In close cases the placement of the burden of proof is often outcome-determinative. *E.g., United States ex rel. S.E.C. v. Billingsley*, 766 F.2d 1015, 1023 (7th Cir. 1985); *United States v. DiGilio, supra*, 532 F.2d at 988-989; *see*, Underwood, *The Thumb On the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1308 (1977). This Court has also recognized that emphasis upon an error by the prosecutor in argument exacerbates its prejudicial effect. *Chapman v. California*, 386 U.S. 18, 25-26 (1967). Under these circumstances, there can be no rational argument that the constitutional error in imposing the burden of proof on the defendant could be found, beyond a reasonable doubt, not to have contributed to the verdict. *Id.*; *United States ex rel. S.E.C. v. Billingsley, supra*, 766 F.2d at 1247-1248.

I. Conclusion

The practical effect of the current imposition of the burden of proof of incompetence on the defendant is aptly stated in the amicus curiae brief of CJLF: "The effect of California's rule is to draw the circle around the defendants classified as 'incompetent' with a slightly smaller radius than is used in some other jurisdictions. A few defendants who would otherwise be considered marginally incompetent will instead be considered marginally competent." CJLF Br. at 16. It is precisely because the rule significantly increases the danger that incompetent defendants will "instead be considered marginally competent," and therefore be unconstitutionally subjected to trial, that the imposition of the burden of proof on the defendant is constitutionally unacceptable.

The integrity of the criminal process and the reliability of any resulting conviction and sentence depend upon the presence of a competent defendant at trial. Once a doubt has been found as to the defendant's competence, due process requires that the state make an affirmative showing, by the greater weight of the evidence, that the defendant is capable of standing trial. *See* ABA *Criminal*

Justice Mental Health Standards, Standard 7-4.8(c)(ii). Because petitioner's jury was not required to make an affirmative finding that he was competent, the judgment must be reversed.

II. THE INSTRUCTION IMPOSING AN IRRATIONAL PRESUMPTION OF COMPETENCE IN THE JURY'S DELIBERATIONS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

In the opening brief, petitioner showed that the instruction admonishing the jury that the defendant is presumed to be competent, in addition to the instruction placing the burden of proof of incompetence on the defendant, is irrational in the context of the competency proceeding.[13] The trial court's declaration of a doubt as to the defendant's competency implies a prima facie showing of incompetence, *People v. Samuel*, 29 Cal.3d 489, 495-496, 629 P.2d 485 (1981); and in the litigation of the issue the defendant is treated, as a result of that declaration of doubt, as if he is incompetent. Thus the

[13] Respondent contends that this argument is not properly before the Court. Resp. Br. at 44-45; U.S. Br. at 26-27. Contrary to respondent's assertion, the irrationality of the presumption instruction was raised below and was explicitly addressed in the decision of the California Supreme Court. JA 100. In the petition for certiorari, petitioner asserted the irrationality of the presumption, in light of the state's treatment of the defendant as incompetent in the context of the competency proceeding. Pet. Cert. at i, 13. This issue is therefore "fairly included" within the question upon which the court granted certiorari. Sup. Ct. Rule 24.1(a); *see, e.g., Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980); R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, § 6.25 at 358-361 (6th ed. 1986) (and cases cited therein). The situation in no way resembles those in the cases cited by respondent and the United States. *Heath v. Alabama*, 474 U.S. 82, 85, 87 (1985) (issue of jurisdiction of state court not included in grant of certiorari on double jeopardy and dual sovereignty issues); *Tison v. Arizona*, 481 U.S. 137, 146 n.2 (1987) (issue of state's overbroad construction of statutory aggravating factors not included in grant of certiorari on issue whether death penalty could be imposed on defendant who did not commit or intend killing).

instruction that the defendant is presumed to be competent is entirely irrational, in light of the state's actual treatment of the defendant. That instruction, in combination with the instruction imposing the burden of proof on the defendant, is likely to have a "significant additional" effect upon the jury. *See Taylor v. Kentucky*, 436 U.S. 478, 483 n. 12 (1978). Such an instruction may be considered by the jury as evidence, and result in the jury requiring a greater showing than is, or can be, imposed by instructions on the burden of proof. *E.g., Western & Atlantic R. Co. v. Henderson*, 279 U.S. 639, 642-644 (1929).

Respondent argues that the presumption instruction is merely a restatement of the burden of proof. Respondent does not analyze the decision in *Taylor*, which indicates that such an instruction increases the force of the burden of proof. Nor does respondent discuss the decision in *Henderson*, which indicates that a jury may view the presumption as evidence supporting the party in whose favor the presumption operates. The United States, as amicus curiae, argues that there is no "reasonable likelihood" that the jury would understand the presumption instruction as petitioner suggests. *Boyde v. California*, 494 U.S. 370 (1990). Amicus does not, however, discuss *Taylor* or *Henderson* any more than respondent does, and nothing in *Boyde* or its progeny suggests that the principles enunciated in those cases have been altered; in fact, both *Taylor* and *Henderson* are based upon the likely effect of presumption instructions.

The failure of respondent and of amicus supporting respondent to come to grips with these cases is a virtual concession that they cannot be distinguished. Petitioner relies upon the authorities cited in the opening brief and submits that the instruction injecting this irrational, evidentiary presumption of competence into the jury's deliberations violated petitioner's right to due process of law under the Fourteenth Amendment.

CONCLUSION

For the reasons stated here and in petitioner's opening brief, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

No. 90-8370

In the Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR., PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause prohibits a State from assigning to the defendant in a criminal case the burden of proving that he is incompetent to stand trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-8370

TEOFILO MEDINA, JR., PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

Section 1369(f) of the California Penal Code establishes a presumption that the defendant in a criminal case is competent to stand trial and assigns to the defendant the burden of proving that he is incompetent. The question in this case is whether Section 1369(f) violates the Due Process Clause of the Fourteenth Amendment. This Court's resolution of that question will directly bear on the constitutionality of 18 U.S.C. 4241(d), a provision of the Insanity Defense Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2057-2059; App. A, *infra*, 1a-2a. Section 4241(d) of Title 18 authorizes a court to make a finding of incompetence only if the court is persuaded, by a preponderance of the evidence, that,

because of a mental disease or defect, the defendant "is unable to understand the nature and consequences of the proceeding against him or to assist properly in his defense." That statute in effect places the burden of proving that the defendant is incompetent to stand trial on the party asserting incompetence. The United States therefore has a direct interest in the outcome of this case.

STATEMENT

1. Petitioner engaged in a crime spree from October 13 to November 7, 1984. During that period, petitioner stole a gun from a pawnshop and then robbed two gas stations, a drive-in dairy, and a market. In the course of the robberies, petitioner murdered three employees of those establishments, attempted to rob a fourth, and shot at two persons who tried to follow his getaway car. J.A. 90.

2. Before trial, petitioner moved for a hearing on his competence to stand trial. The court granted the motion and held an evidentiary hearing before a jury, at which various expert and lay witnesses gave conflicting testimony about petitioner's competence. J.A. 3-84, 90-91. At the close of the hearing, the trial judge instructed the jury, in accordance with Cal. Penal Code § 1369(f) (West 1982), that petitioner was presumed to be competent to stand trial and that he had the burden of proving his incompetence. J.A. 87. The jury found him competent. J.A. 88.

Thereafter, petitioner was tried on various charges arising from his crime spree. He was convicted on three counts of murder as well as several other offenses; the jury found that each murder was deliberate and premeditated, and that petitioner was sane at the time of the charged offenses. He was sentenced to death for the three murders. J.A. 89-92.

3. The Supreme Court of California affirmed petitioner's convictions and sentence by a divided vote. J.A. 89-146. The court rejected his claim that Cal. Penal Code § 1369(f) violated his rights under the Due Process Clause by requiring him to bear the burden of proving his incompetence to stand trial. J.A. 93-101. The court held that a state legislature has considerable freedom in assigning the burden of proof on the issues in a criminal case, as long as the prosecution bears the burden of proving every element of the charged offense. J.A. 97-99. The court then determined that it was rational for the legislature to assign the burden of proof on the issue of competence to the defendant, because the defendant and his attorney would have better access than the State to the facts relevant to that inquiry. J.A. 99-100. Addressing the meaning of the presumption of competence set forth in Section 1369(f), the court held that the presumption is simply another way of expressing the legislative intent to place the burden of proof on the party seeking to establish that the defendant is incompetent.[1]

SUMMARY OF ARGUMENT

A. It does not violate any long-settled and widely accepted legal principle to place the burden of proof on the issue of competence on the party seeking to show that the defendant is mentally unfit to be tried. The common law did not impose the burden on the party seeking to prove competence, and very few modern legislatures have adopted such a rule. Thus, the objective evidence bearing on the due process in-

[1] Justices Mosk and Broussard dissented. They concluded that due process forbids assigning to a criminal defendant the risk of nonpersuasion on this issue. J.A. 146-163.

quiry provides no support for petitioner's challenge to the constitutionality of Cal. Penal Code § 1369(f).

B. The allocation of the burden of proof in Section 1369(f) is also reasonable. Due process requires the State to prove the elements of any charged offense beyond a reasonable doubt. Section 1369(f) does not lighten that burden, because a defendant's competence to stand trial is not an element of a criminal offense. Nor is Section 1369(f) unconstitutional because it imposes the burden of establishing incompetence on a party who, because of his incompetence, may be unable to satisfy that burden. The procedures required by the Constitution and erected by the State for litigating the issue of competence ensure that the issue will be fully and fairly aired even if the defendant himself is unable to cooperate in the litigation of the issue.

We believe that the absence of any indication that the California rule is inconsistent with traditional Anglo-American practices or principles of fairness should settle the due process issue. But even if the constitutional question may be resolved only by balancing the competing interests, there is no compelling case for imposing the burden of proof on the party claiming the defendant to be competent. To be sure, a defendant has an important interest in not being tried if he is incompetent, and placing the burden on the defendant to establish his incompetence will doubtless result in some erroneous findings of competence. But placing the burden on the government is equally likely to produce erroneous findings of incompetence. And those errors will have significant adverse effects as well. A finding of incompetence delays and may even preclude the resolution of criminal charges against the defendant, which imposes burdens

on witnesses, victims, and victims' families. Moreover, a finding of incompetence typically results in restraints on liberty such as confinement in a mental facility and psychiatric treatment, which may include treatment against the defendant's will. By reducing the risk of finding a competent defendant incompetent, Section 1369(f) reduces the likelihood that the defendant will erroneously be subjected to those restraints.

ARGUMENT

DUE PROCESS DOES NOT PROHIBIT A STATE FROM ASSIGNING THE BURDEN OF PROOF ON THE ISSUE OF COMPETENCE TO THE PARTY ASSERTING THAT THE DEFENDANT IS INCOMPETENT TO STAND TRIAL

The Due Process Clause prohibits the trial of a mentally incompetent defendant. *Drope* v. *Missouri*, 420 U.S. 162 (1975); *Pate* v. *Robinson*, 383 U.S. 375 (1966). The issue of competence, when raised by the evidence, is typically resolved at a pretrial hearing. This case involves the question of which party bears the burden of proof at a hearing on the competency issue. Section 1369(f) of the California Penal Code adopts a rebuttable presumption that the defendant is competent to stand trial and assigns the burden of proof to the party asserting incompetence. The California Supreme Court held that allocating the burden in that way does not violate the Due Process Clause of the Fourteenth Amendment. In our view, history and reason support that judgment.

A. Anglo-American Legal History And Contemporary Legislation Do Not Require The State To Prove That A Defendant Is Competent To Stand Trial

The teaching of Anglo-American legal history and the judgments of contemporary legislatures bear heavily on the meaning of the Due Process Clause.

See, *e.g.*, *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991), slip op. 3-5; *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934). Historical analysis has often been applied to constitutional challenges to the allocation of the burden of proof in criminal cases. See *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (requiring defendant to bear the burden of proof on affirmative defenses "was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified"); *Martin* v. *Ohio*, 480 U.S. 228, 235 (1987); *In re Winship*, 397 U.S. 358, 361-362 (1970); *Leland* v. *Oregon*, 343 U.S. 790, 796-799 (1952). As this Court explained in *Patterson* v. *New York*, 432 U.S. at 201-202:

> Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

The historical record and contemporary evidence convincingly prove that allocating to the defendant the burden of proving that he is incompetent to stand trial does not violate any deeply rooted Anglo-American legal tradition.

1. *The State historically has not been required to prove that the defendant is competent to stand trial*

a. *The English tradition.* Perhaps the first recorded judicial treatment of the propriety of trying a person who was "insane" (the term then used to refer to incompetence by reason of mental disorder) occurred in 1353. In that year, Justice Hill, one of Edward III's itinerant justices, decided not to try an "enraged" quadruple murderer until the defendant had "recovered his senses." N. Walker, *Crime and Insanity in England* 220 (1968). Blackstone stated the common law rule when he wrote that "if, after he has pleaded, the prisoner becomes made, he shall not be tried: for how can he make his defence?" 4 W. Blackstone, *Commentaries* *24. By the time of the American Revolution, the rule barring the trial of the insane was firmly entrenched.[2]

At the same time, virtually no attention was paid to the question of which party bore the burden of proof on the issue of competence. The early decisions are silent on the subject,[3] and the only commentator to express a view on the matter was Sir Matthew Hale, who appears to have assigned the burden of proof to the party claiming that the defendant could not be tried because of his incompetence.[4] Even peti-

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[2] *E.g.*, 3 E. Coke, *Third Institute* 6 (6th ed. 1680); 1 M. Hale, *Pleas of the Crown* 34 (*34-*35) (1st Am. ed. Philadelphia 1847); 1 W. Hawkins, *Pleas of the Crown*, ch. I, §§ 3-4, at 2-3 (6th ed. London 1777). Post-revolutionary commentators endorsed that rule, too. See 1 J. Archbold, *A Complete Practical Treatise on Criminal Procedure* 26-31 (7th ed. New York 1860); 1 J. Chitty, *A Practical Treatise on the Criminal Law* 760 (*761) (5th Am. ed. New York 1847); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 20-21 (1st Am. ed. Boston 1824).

[3] See, *e.g.*, *Hadfield's Case* (1800), 27 Stat. Trials 1281 (Howell ed. 1820); *Firth's Case* (1790), 22 State Trials 307 (Howell ed. 1817); *Kinlock's Case* (1746), 18 State Trials 395 (Howell ed. 1816), 411; *R.* v. *Arnold* (1724), 16 State Trials 695 (Howell ed. 1816).

[4] Before stating that a person "of non sane memory" cannot be tried, he wrote that "[i]n presumption of law, every

tioner, who contends that the common law supports his position, ultimately concedes that the common law was "not entirely clear" in 1787. Br. 36. It is more accurate to say that there was no common law rule on this issue at all.

It was not until the mid-19th century that courts began to consider the burden of proof issue. Even then, the few cases that discussed the matter could not agree on its proper allocation. See *Regina* v. *Podola*, 43 Crim. App. 220, 235-236, [1959] 3 All E.R. 418, 429-430 (citing conflicting cases); N. Walker, *supra*, at 231 (the burden of proof "swung to and fro over the last century").[5] The English

person of the age of discretion is presumed of sane memory, unless the contrary be proved." 1 M. Hale, *supra*, at 33 (*33).

[5] Petitioner's contrary assertion—that placing the burden on the prosecution to prove the defendant's competence was the unquestioned English practice from 1787 until the mid-19th century, Br. 37—is incorrect. The case he relies on, *King* v. *Steel*, 1 Leach 452, 168 Eng. Rep. 328 (1787), placed the burden on the prosecution only because a jury had already found the defendant "Mute by visitation of God," *i.e.*, deaf and dumb. 1 Leach at 452, 168 Eng. Rep. at 328. The decision therefore stands only for the proposition that when a defendant is found to be deaf and dumb, he is presumed to be incompetent to stand trial.

Our research discloses confusion throughout the 19th century over the burden of proof on the issue of competence. Compare R. v. *Dyson*, 7 Carrington & Payne 305, 307 (note), 173 Eng. Rep. 135, 136 (note) (1831) (placing burden of proof on defendant by instructing jurors to acquit if "they were satisfied that the prisoner had not then, for the defect of her faculties, intelligence enough to understand the nature of the proceedings against her") (emphasis omitted) with *R.* v. *Davies*, 6 Cox 326, 175 Eng. Rep. 575 (1853) (prosecution bears the burden). See also *Ley's Case*, 1 Lewin 239, 240, 168 Eng. Rep. 1026, 1026 (1828) ("If there be a doubt

courts did not finally resolve the matter until 1959 when they rejected the rule proposed by petitioner. In *Refina* v. *Podola*, *supra*, the Court of Criminal Appeal held that the burden of proof falls on the party asserting that the defendant is incompetent, and that is the present English rule. G. Williams, *Criminal Law* § 143, at 437 n.12 (2d ed. 1961).[6]

b. *The American tradition.* Early in our history, American courts adopted the English rule that an insane defendant could not be arraigned or tried. See, *e.g.*, *Commonwealth* v. *Braley*, 1 Mass. 102 (1804). This Court endorsed the rule in 1956, *Bishop* v. *United States*, 350 U.S. 961, and a decade later the Court imposed it on the States under the Due Process Clause of the Fourteenth Amendment, *Pate* v. *Robinson*, 383 U.S. 375 (1966).

As in England, American courts historically paid little attention to the question of who bears the burden of proof on the issue of competence. Some early cases stated that a defendant is presumed to be sane,[7] but

as to the prisoner's sanity, and the surgeon says that it is doubtful, you cannot say that he is in a fit state to be put upon his trial.").

[6] Petitioner criticizes *Podola* on the ground that the trial court allegedly confused insanity with incompetence. Br. 38, citing [1959] 3 All E.R. at 419. But it was the Court of Criminal Appeal that ultimately decided the case, 43 Crim. App. at 220, [1959] 3 All E.R. at 426-433, and that court exhibited no such confusion. It clearly understood that the question was whether the defendant was competent to stand trial, and it just as clearly placed the burden of proof on the party asserting that the defendant was incompetent.

[7] See, *e.g.*, *Youtsey* v. *United States*, 97 F. 937, 941 (6th Cir. 1899); *United States* v. *Chisolm*, 149 F. 284, 289 (S.D. Ala. 1906); *State* v. *Arnold*, 12 Iowa 479, 484 (1861).

did not further discuss how the burden of proof on competence was to be allocated between the State and the defense.[8] Only in the past two decades have the courts focused on the burden of proof issue, and those decisions are not especially instructive. Virtually every recent decision addresses the issue as a matter of constitutional law, not policy, and thus answers the question whether the State *must* prove that a defendant is competent to stand trial, not whether the State *should* be required to prove that fact. In any event, contemporary case law is closely divided as to where the burden of proof should rest. J. Monahan & H. Steadman, *Mentally Disordered Offenders* 14 (1983).[9] Thus, our legal history does not reflect a consensus on how the burden of proof should be allocated, and it certainly does not dictate that the State must bear that burden, as petitioner claims.

2. Contemporary legislation does not establish a consensus requiring a State to prove that a defendant is competent

Contemporary legislation also does not support petitioner's position. Federal law places the burden of proof on the party asserting that the defendant is

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[8] One decision early in this century said that the defendant had to prove that he was incompetent, *State* v. *Helm*, 69 Ark. 167, 61 S.W. 915 (1901); another said that the accused has the burden of raising a reasonable doubt as to his competence, *United States* v. *Chisolm*, 149 F. at 290; and a third said that the defendant had the burden of proving that he was insane, but (inconsistently) went on to say that the jury should find a defendant incompetent if it had a reasonable doubt on the issue, *United States* v. *Lancaster*, 7 Bissell's Rpts. 440, 444 (C.C.N.D. Ill. 1877).

[9] The recent state and federal cases are cited in an appendix to this brief.

incompetent to stand trial.[10] Although every State has enacted legislation dealing with the issue of competence to stand trial, only 14 of the state statutes address the allocation of the burden of proof. Two of them require the prosecution to prove that the defendant is competent to stand trial.[11] One requires the prosecution to prove the contrary of whatever

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[10] 18 U.S.C. 4241(d). Section 4241(d) was adopted as part of the Insanity Defense Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 403(a), 98 Stat. 2057-2059. Before 1984 federal statutes dealing with incompetence did not allocate the burden of proof on this matter. See 18 U.S.C. 4244 (1982); Rev. Stat. § 4851 (1874).

The Fifth and Ninth Circuits have said that 18 U.S.C. 4241(d) requires the government to prove that a defendant is competent. *Lowenfield* v. *Phelps*, 817 F.2d 285, 294 (5th Cir. 1987), aff'd on other grounds, 484 U.S. 231 (1988); *United States* v. *Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987); *United States* v. *Frank*, 933 F.2d 1491 (9th Cir. 1991); *United States* v. *Hoskie*, No. 89-10348 (9th Cir. Dec. 6, 1991), slip op. 15,437-15,438. Those courts, however, have simply misread the 1984 statute. *Lowenfield* involved a state prisoner's challenge to a Louisiana law assigning to the accused the burden of proving incompetence. The court's statement about the federal statute is therefore dictum. *Lowenfield* also did not discuss the changes in federal law wrought by the 1984 Act; the court just cited case law construing the pre-1984 federal statute. *Hutson* just relied on *Lowenfield* and a pre-1984 case without independently analyzing the issue; *Frank* relied on *Hutson;* and *Hoskie* relied on *Frank*. Thus, the later cases have simply reiterated the Fifth Circuit's initial error in *Lowenfield*. None of those cases is persuasive authority for placing the burden of proof on the government.

[11] Ill. Ann. Stat. ch. 38, para. 104-11 (Smith-Hurd 1980); Minn. R. Crim. P. 20.01, subd. 3(6) (West 1991).

the defendant alleges.[12] The remainder place the burden of proving incompetence on the party raising that claim.[13] S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 703, Table 12.1, col. 18, at 744-754 (3d ed. 1985) [hereinafter cited as *Mentally Disabled*]. The pattern of contemporary statutes therefore does not establish a national consensus against requiring a defendant to prove his incompetence. See *Stanford* v. *Kentucky*, 492 U.S. 361, 370-373 (1989) (no consensus exists barring the execution of 16-year-olds when a majority of the States with capital punishment laws allow such persons to be executed). If anything, the pattern among those jurisdictions that have legislation addressing the matter suggests a consensus in favor of the California

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[12] Wis. Stat. Ann. § 971.14(4)(b) (West Supp. 1991). The Wisconsin statute provides that if a defendant claims to be incompetent, he must be found to be incompetent unless the State proves by a preponderance of the evidence that he is competent. By contrast, if a defendant claims to be competent, Wisconsin law directs that the defendant will be found competent unless the State proves by clear and convincing evidence that he is incompetent.

[13] Alaska Stat. § 12.47.110 (1990); Colo. Rev. Stat. § 16-8-111(2) (1986); Conn. Gen. Stat. Ann. § 54-56d(b) (West 1985); Mass. Ann. Laws ch. 123, § 15(*d*) (Law. Co-op. 1989); Ohio Rev. Code Ann. § 2945.37(A) (1987 & Supp. 1990); Okla. Stat. Ann. tit. 22, § 1175.4(B) (1986 & Supp. 1991); Pa. Stat. Ann. tit. 50, § 7403(a) (Purdon Supp. 1991); Tex. Crim. Proc. Code Ann. art. 46.02, § 1(b) (Vernon 1979); Va. Code Ann. § 19.2-169.1(E) (1990); Wash. Rev. Code Ann. § 10.77.090(2) (1990); W. Va. Code § 27-6A-1(d) (1986). The Michigan statute states that the defendant is presumed to be competent, but it does not expressly address the burden of proof issue. Mich. Comp. Laws Ann. § 330.2020 (West 1980); see *People* v. *Ritsema*, 105 Mich. App. 602, 606, 307 N.W.2d 380, 382 (1981).

rule, which places the burden on the party seeking to establish incompetence.

B. Assigning The Burden Of Proof To The Party Claiming That The Defendant Is Incompetent To Stand Trial Reasonably Balances The Competing Interests

1. *Section 1369(f) does not lighten the State's burden of proving every element of a charged offense*

Due process requires a State to bear the burden of proof, beyond a reasonable doubt, on every element of a charged offense. *In re Winship*, *supra*. Otherwise, a State has considerable latitude in allocating the burden of proof. For example, a State may require a defendant to bear the burden of proving the affirmative defense of insanity, *Leland* v. *Oregon*, 343 U.S. 790 (1952), or that he acted in self-defense, *Martin* v. *Ohio*, 480 U.S. 228 (1987), or in the heat of passion, *Patterson* v. *New York*, 432 U.S. 197 (1977). See also *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 172-176 (1872) (defendant can be made to bear the burden of proof or production on an exception to a statutory offense). Similarly, the State may require a defendant convicted of a capital crime to bear the burden of establishing mitigating circumstances sufficient to call for a penalty less than death. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3055-3056 (1990).

The rationale of those decisions is applicable to this case, since competence to stand trial is not an element of a criminal offense. As this Court has explained, a defendant's "criminal responsibility at the time of the alleged offenses * * * is a distinct issue from his competency to stand trial." *Jackson* v. *Indiana*, 406 U.S. 715, 739 (1972). The two questions involve different elements and different time periods.

See *Lynch* v. *Overholser*, 369 U.S. 705, 709 n.4 (1962). The mens rea element of a crime is retrospective; the prosecution must prove that the defendant committed "an unlawful act" with "a vicious will." *Davis* v. *United States*, 160 U.S. 469, 484 (1895). By contrast, the standard for competence to stand trial focuses on the present; the inquiry is whether a person has the "present ability" rationally to understand the nature of the proceedings and assist his lawyer in his defense. *Dusky* v. *United States*, 362 U.S. 402, 402 (1960). Requiring a defendant to prove his incompetence therefore does not lessen a State's burden under *Winship*.

2. The defendant's asserted inability to assist in the determination of his competence does not require the State to bear the burden of proof on that issue

This Court said in *Pate* v. *Robinson*, 383 U.S. at 384, that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Some courts have relied on that passage to hold that the State must prove that the defendant is competent to stand trial. See, *e.g.*, *United States* v. *DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *People* v. *McCullum*, 66 Ill. 2d 306, 312-314, 362 N.E.2d 307, 310-311 (1977). Those courts, we submit, have misread *Pate*.

Pate did not address the burden of proof. It addressed the State's argument that "Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law." 383 U.S. at 384. This Court rejected that argument because of the obvious contradiction on which the State's claim hinged. But the question whether the defendant has forfeited his right to contend on appeal that he was incompetent when he was tried is not the same as the question whether a defendant can be assigned the burden of proving that he is not mentally fit to be tried once that issue is before the trial court. The waiver issue involves the problem of how the defendant's competence can be brought before a trial court for resolution when the defendant himself may be unable, due to his mental illness, to raise that issue; the answer to that problem is to require the trial judge to make an inquiry into the defendant's competence if there is a bona fide doubt about the defendant's fitness to be tried. See *Drope*, 420 U.S. at 172-182; *Pate*, 383 U.S. at 385-386. The burden-of-proof issue is concerned with a different problem: how to allocate the risk of nonpersuasion between the State and the defendant, once the issue has been raised. *Pate* did not purport to address, let alone resolve, that issue.

Given the safeguards required by the Constitution and routinely made a part of the procedure for competency determinations, a defendant's mental illness will not hamper the correct resolution of the competency issue regardless of the allocation of the burden of proof. The trial judge has the duty to inquire into the defendant's competence if there is reason to doubt that the defendant can understand the proceedings or assist his attorney. *Drope*, 420 U.S. at 172-182; *Pate*, 383 U.S. at 385-386; see Cal. Penal Code § 1368(a) (West 1982). Once a defendant's competence has been called into question as a result of observations by defense counsel, the prosecutor, or the court itself, the court can order him psychiatrically examined and can temporarily commit him

to a mental hospital for that purpose. Cal. Penal Code §§ 1369(a), 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(b), 4247(b). Mental health experts can examine the defendant and testify about their findings at any ensuing competence hearing. Cal. Penal Code §§ 1369(b)-(d) and 1370(b)(1) (West 1982 & Supp. 1991); 18 U.S.C. 4241(b) and (c), 4247(b), (c), and (e). Even if the court finds that the defendant is competent to stand trial, it has a continuing obligation to monitor the defendant's competence throughout the trial and must reconsider the matter if new facts raise a reasonable doubt about his mental state. *Drope*, 420 U.S. at 172-182. In sum, the system for determining whether a defendant is competent to stand trial is specifically designed to produce an accurate resolution of that issue even if the defendant is incapable of assisting in the process leading to that determination (or is actively resisting such a finding). For that reason, there is no reason to suppose that a defendant's mental illness will prevent the defense from proving that the accused is incompetent to stand trial.

3. *Balancing the competing interests does not indicate that the burden of proof must be on the party seeking to establish the defendant's competence*

It is reasonable to require the party seeking to establish that a defendant is incompetent to bear the burden of proof on that issue. This Court noted almost a century ago that the law presumes that a person is sane and that the presumption is "justified by the general experience of mankind" as well as by "considerations of public safety." *Davis* v. *United States*, 160 U.S. at 486. If it is permissible on those

grounds to assume that a defendant is sane, it is equally permissible, for the same reasons, to presume that a defendant is competent to be tried and therefore to place the burden on the party seeking to establish the contrary. Petitioner does not directly challenge those propositions, but instead attacks them indirectly by claiming that the Due Process Clause requires that the presumption of competence "fly away," "burst," or disappear once some proof of a defendant's mental illness is adduced.

Due process does not require a State to adopt a "bursting presumption" rule with respect to the burden of proof on the issue of competence. That is because the policy considerations that justify the initial presumption of competence "generally persist despite the existence of proof rebutting the presumed fact." *McCormick's Handbook of the Law of Evidence* § 345, at 822 (E. Cleary 2d ed. 1972). Experience teaches that most persons are mentally competent, that it is easier to prove incompetence than competence, and that the defense ordinarily has better access to information bearing on the competency inquiry than does the State.[14] For those reasons, it is rational for a legislature to conclude that all defendants should be presumed competent, and that the burden of proof

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[14] Petitioner disputes the second and third of those propositions, but his argument is unconvincing. In seeking to establish the defendant's incompetence, defense counsel will ordinarily have the cooperation of the defendant's family and associates, and often will have cooperation from and superior access to the defendant himself. Moreover, proving competence requires the State to prove, in essence, that the defendant is not deranged. Making such a showing presents not only the difficulties typically associated with proving a negative, but also the difficulties inherent in having to prove the mental state of another. Those difficulties are exacerbated if the defendant is resisting a finding of competence.

should rest with the party who claims that the defendant is among the few exceptions to the general rule. That is the rationale for imposing on the defendant the burden of proof to establish affirmative defenses, and this Court has repeatedly upheld applications of that principle against constitutional challenge.[15]

Petitioner makes no effort to prove that the presumption and assignment of the burden of proof in Cal. Penal Code § 1369(f) "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson* v. *New York*, 432 U.S. at 202. In fact, petitioner does not even discuss the decisions in *Patterson*, *Martin*, and *Walton*. Instead petitioner invokes this Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), which involved a constitutional claim of entitlement to a hearing prior to the termination of disability benefits. In that case, the Court noted three factors that bear on whether a pretermination hearing is required in a particular setting: (1) the private

[15] Petitioner seeks to distinguish this case from cases involving the burden of proof for affirmative defenses on the ground that affirmative defenses "may not be constitutionally required." Br. 14 n.4. Even if this Court's decisions on affirmative defenses can be distinguished on that ground, *Walton* v. *Arizona*, *supra*, clearly cannot. *Walton* upheld a statute requiring a defendant to prove by a preponderance of the evidence the existence of mitigating factors sufficiently substantial to call for leniency before the sentencing agency could consider such proof, despite the fact that a defendant in a capital case has a constitutional right to have the sentencer consider such proof. The Court determined that the statute did not violate the rule set forth in *Winship*, and it rejected the very distinction that petitioner seeks to draw here. Compare 110 S. Ct. at 3055 with *id.* at 3072 (Blackmun, J., dissenting).

interest that is affected by the official action; (2) the risk of an erroneous deprivation, and the extent to which additional procedural safeguards would reduce that risk; and (3) the burdens that additional procedures would place on the government. 424 U.S. at 335.

Although petitioner claims that the *Eldridge* balancing test "has consistently been used to analyze issues as to the allocation and degree of the burden of proof," Br. 10, none of the decisions he cites involved the allocation of the burden of proof, much less held unconstitutional a State's allocation of that burden.[16] With respect to the allocation of the burden of proof, the Court has not invoked the *Eldridge* balancing test, but has looked mainly to history and current practice to determine if the legislative decision at issue was consistent with due process. And on that question, as we have noted, the Court has consistently upheld statutes allocating to the defendant the burden of proof on issues other than the elements of the offense.

[16] The cases on which petitioner relies addressed the issue of the appropriate standard of proof, not the issue of the proper allocation of the burden of proof, *i.e.*, the risk of nonpersuasion. See *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981-2982 (1990) (whether a State may require a minor to prove by clear and convincing evidence that an abortion is in her best interests); *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2852-2855 (1990) (whether a State may require proof by clear and convincing evidence of the wishes of an incompetent patient about withdrawal of hydration and nutrition); *Santosky* v. *Kramer*, 455 U.S. 745 (1982) (whether a State may allow a parent to be declared unfit by a preponderance of the evidence); *Addington* v. *Texas*, 441 U.S. 418 (1979) (whether a State may allow a person to be civilly committed indefinitely upon proof by a preponderance of the evidence).

Even if *Eldridge* is applicable in this setting, the three-factor test from *Eldridge* does not suggest that it is constitutionally impermissible to allocate the burden of proof to the party seeking to prove that the defendant is incompetent.

a. With respect to the first *Eldridge* factor—the importance of the private interest at stake—petitioner emphasizes the "fundamental" nature of the defendant's interest in being tried only if he is competent. Br. 11-15. While it is true that the rule against trying an incompetent defendant is "fundamental to an adversary system of justice," Br. 11 (quoting *Drope*, 420 U.S. at 172), that does not end the inquiry. A State's interest in trying a competent defendant is no less "fundamental" than the interest of an incompetent defendant in not being tried. As Justice Brennan once explained, the "[c]onstitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." *Illinois* v. *Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring). See *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.") (quoting *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960)).

By analogy, the allocation of the burden of proof on the insanity defense is quite instructive on this point. There is a compelling interest in not convicting persons who are insane—an interest that could properly be deemed "fundamental"; every jurisdiction recognizes an insanity defense, and there is a universally shared belief that it is wrong to impose punishment on a person who is incapable of appreciating the nature and quality or the wrongfulness of his acts. On the other side of the balance, one

could argue that the consequences to the State of an acquittal by reason of insanity are not very grave: the verdict resolves the criminal charges, and the State has means of protecting itself against dangerous insanity-acquitted defendants through civil commitment, which can last even longer than the sentence that could have been imposed for the charged offense. *Jones* v. *United States*, 463 U.S. 354 (1983). Nonetheless, this Court has rejected the argument that due process requires the State to bear the burden of proof on the issue of insanity. *Leland* v. *Oregon*, *supra*; see also *Rivera* v. *Delaware*, 429 U.S. 877 (1976).[17]

This case follows *a fortiori* from the cases involving the burden of proof on the insanity defense. The consequence of imposing the burden of proof on the defendant to establish his insanity may be to convict and punish a person who is not responsible for his acts. By contrast, the consequence of imposing the burden of proof on the defendant to establish his incompetence is only to require him to stand trial; he may still be acquitted, by reason of insanity or otherwise, and if his incompetence becomes manifest at any time during the trial, the court must revisit the question and suspend the trial if necessary. Thus, the "fundamental" nature of the defendant's interest in not being tried while incompetent does not resolve the burden of proof issue.

b. The second *Eldridge* factor—the risk of an erroneous decision under the challenged procedures—

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[17] Similarly, it is "fundamental" that an insane prisoner may not be executed, *Ford* v. *Wainwright*, 478 U.S. 399 (1986), but the prisoner may be required to prove that he is insane. See *id.* at 410 ("Petitioner's allegations of insanity, if proved, * * * would bar his execution.").

also does not suggest that Section 1369(f) of the California Penal Code is unconstitutional. Petitioner claims that there is a significant risk that the trier of fact will erroneously find a mentally ill defendant competent due to the inherent uncertainty of psychiatric diagnoses. Br. 15-18. But the imprecision of competency determinations merely makes the chance of error greater overall; it does not make it more likely that error will be made in one direction rather than the other.

Obviously, allocating the burden to one party increases the risk of an "erroneous" decision against that party, just as it decreases the risk of an erroneous decision against the party that does not bear the burden.[18] But that is not to say that the overall risk of error is increased by placing the burden of proof on the party claiming incompetence. In referring to the increase in the risk of error, what petitioner really means is that in his view the consequences of error are more serious when a court finds a defendant competent than when it finds him incompetent. Thus, he suggests that erroneous findings of incompetence are relatively innocuous, while erroneous findings of competence have very severe consequences.

[18] Of course, with respect to the inexact science of assessing mental functioning, there is no baseline from which to determine with complete confidence when a particular ruling is "erroneous" and when it is correct. Nonetheless, placing the burden on one party rather than the other means that there is likely to be an increase in the number of rulings against the party with the burden. Inevitably, some of those rulings will be incorrect. It therefore stands to reason that the allocation of the burden of proof will ordinarily result in an increase in the number of "erroneous" rulings against the party with the burden of proof, regardless of how one determines what constitutes "error" in a competency ruling.

For that reason, the subtext of petitioner's argument is that the Constitution requires a State to allocate the burden of proof in a way that will make erroneous determinations of competence less likely and erroneous determinations of incompetence correspondingly more likely.[19] While petitioner prefers that outcome, it is not correct to pretend that that outcome represents an increase in the accuracy of the adjudicative process and a reduction of the risk of error. In sum, shifting the burden of proof is not like holding a pretermination hearing, the issue presented in *Eldridge*. Holding a pretermination hearing is likely to increase the accuracy of the termination decision; shifting the burden of proof to the State, by contrast, would do nothing to make the competency determination more reliable.

c. It is the third *Eldridge* factor—the costs and burdens of the proposed procedure—that provides the strongest argument against a constitutional rule imposing the burden of proof on the party seeking to

[19] Petitioner suggests that the burden of proof should be on the State in part because courts and juries are often skeptical of claims of incompetence and may suspect malingering even in the face of clear symptoms of severe mental illness. Despite petitioner's assertions on this score, however, there is no objective basis for concluding that finders of fact disregard compelling evidence of incompetence more often than they are fooled by a convincing, but contrived, effort by the defendant to appear to be incompetent. Indeed, in a case where the accused has no defense on the merits and faces a lengthy prison term, or in a case such as this one, where the defendant faces capital punishment, the incentive to feign incompetence may be considerable, and it is likely that the percentage of claims of incompetence that turn out to be the product of malingering will be correspondingly high.

establish a defendant's competence. We disagree with petitioner's suggestion that the consequences of an erroneous finding of incompetence are not particularly weighty. In fact, placing the burden of proof on the party claiming that the defendant is incompetent serves three important purposes:

First, it promotes the important state interest in the prompt resolution of criminal charges. That interest is not simply a matter of administrative convenience; delay in the trial often makes it more difficult for the State to prove its case and is likely to undermine the prospects for an accurate verdict. See *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986). In addition, the prompt resolution of criminal cases is vitally important to others affected by the criminal justice system, such as potential witnesses, victims, and family members of victims, for whom lengthy pretrial delays can be agonizing. See *Morris* v. *Slappy*, 461 U.S. 1, 14-15 (1983). Indeed, in some cases the allocation of the burden of proof to the State will mean that defendants who have not been shown to be incompetent will never be tried for their crimes, so that those cases will remain perpetually in limbo.[20]

Second, placing the burden of proof on the party claiming that the defendant is incompetent helps pre-

[20] In this regard, it is important to note that the California rule, like the federal rule, requires the party asserting incompetence to bear the burden of proof, regardless of whether that party is the defense or the prosecution. Although it is ordinarily the defendant who is asserting incompetence, that is not always the case. The defendant may have a substantial defense on the merits to the criminal charges and wish to proceed with the trial; imposing the burden of proof on a defendant seeking to prove his own competence could unjustifiably interfere with that interest.

vent the unwarranted confinement of a sane defendant in a mental institution. A defendant found incompetent to stand trial has a right not to be brought to trial in that condition, but he does not have a right to have the charges against him dismissed or to be released from custody. At common law, an insane defendant was committed to the "gaol" or an asylum until he recovered, see 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 20-22 (*20-*23) (1st Am. ed. Boston 1824); *Commonwealth* v. *Braley*, 1 Mass. at 103; *Freeman* v. *People*, 4 Denio 9, 25 (N.Y. Sup. Ct. 1847), and that rule still applies today. Congress and the States have determined that an incompetent defendant should be committed to a mental facility for observation and treatment. *Mentally Disabled* 703-705, Table 12.1, col. 21, at 744-753; *e.g.*, Cal. Penal Code § 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(d). This Court has approved short-term commitments for the period necessary to determine whether a defendant will regain his competence in the foreseeable future, and if so, for the period necessary for treatment designed to attain that end. *Jackson* v. *Indiana*, 406 U.S. at 738. Accordingly, the finding that a defendant is incompetent to stand trial will materially restrict his liberty interests in ways not suffered by other persons charged with a crime or held in jail pending trial. By placing the burden of proof on the party claiming that the defendant is incompetent, Cal. Penal Code § 1369(f) reduces the likelihood of erroneous commitments to mental institutions.

Finally, the allocation of the burden of proof selected by the California legislature helps to avoid the imposition of unnecessary and undesired medical treatment on a competent defendant. An incompetent defendant is committed to a mental hospital not

just for custody but also for treatment designed to restore his competence. Federal and state statutes authorize such treatment, *e.g.*, Cal. Penal Code § 1370 (West 1982 & Supp. 1991); 18 U.S.C. 4241(d), and the courts have upheld that practice, see *e.g.*, *Mentally Disabled* Table 12.1, col. 18, at 744-754; *United States* v. *Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990); *United States* v. *Hayes*, 589 F.2d 811, 823 (5th Cir. 1979).[21] Involuntary medical treatment, however, is an additional intrusion on the liberty interests of an incompetent defendant that is not suffered by other defendants awaiting trial. For that reason, a finding that the defendant is incompetent will materially affect his liberty interest in bodily integrity and in refusing unwanted medical treatment. See *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2851 (1990); *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 24-30 (1905). Placing the burden of proof on the party claiming that the defendant is incompetent helps reduce the risk of erroneous medical treatment.

4. *The court's instruction on the presumption of competence was not improper*

Petitioner claims, Br. 26, 45-50, that the trial court erred by instructing the jury at the competency hearing that "[t]he defendant is presumed to be mentally competent." J.A. 87. It is not clear that that question is properly before the Court. The California Supreme Court did not address that question, see J.A. 93-101, and it is not fairly comprised within Question 1 in the certiorari petition, the only question this Court granted review to decide. Sup. Ct. R. 24.1(a); *e.g.*, *Tison* v. *Arizona*, 481 U.S. 137, 146 n.2 (1987); *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985). In any event, there is no merit to petitioner's claim, because there is no "reasonable likelihood" that the jury applied the challenged instruction in an unconstitutional manner. *Estelle* v. *McGuire*, No. 90-1704 (Dec. 4, 1991), slip op. 9; *Boyde* v. *California*, 494 U.S. 370, 380 (1990). The jury would have understood that instruction as requiring petitioner to prove that he was incompetent, which is precisely what the very next clause in the instruction made clear. See J.A. 87.

In the past, this Court has criticized the careless use of the word "presumption" in jury instructions on the ground that a jury could understand that term to shift the burden of proof or production to a defendant. *E.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). That criticism is beside the point in this case, however, because the State can place either burden on the defendant and has done so. The challenged instruction therefore simply and correctly states the law of California on this issue. If due process permits the State to impose the burden of proving incompetence on the defendant, it cannot be error for the court to explain to the jury the corollary proposition that a defendant is presumed to be competent and must be so found unless the contrary is shown to the jury's satisfaction.[22]

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[21] Most courts have further held that it is permissible to bring a defendant to trial if treatment has rendered him competent, even if he continues to take antipsychotic medication during the trial. That question is pending before the Court in *Riggins* v. *Nevada*, cert. granted, 112 S. Ct. 49 (1991).

[22] It is no more error for the court to instruct the jury on both the presumption of competence and the burden of proof than it would be error for a court to instruct a jury in a

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted.

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JANUARY 1992

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criminal case both that the defendant is presumed to be innocent and that the government bears the burden of proof to establish his guilt.

APPENDIX A

1. Cal. Penal Code § 1369(f) (West 1982) provides as follows:

> In a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

2. 18 U.S.C. 4241(d) provides as follows:

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

> (1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
> (2) for an additional reasonable period of time until—
>
> > (A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that

within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

3. 18 U.S.C. 4244(d) provides as follows:

(d) Determination and disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable facility. Such a commitment constitutes a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty.

APPENDIX B

For recent federal court decisions addressing the allocation of the burden of proof on the issue of competence, compare *Lowenfield* v. *Phelps*, 817 F.2d 285, 294 (5th Cir. 1987) (State may require the defendant to prove by a preponderance of the evidence that he is incompetent), aff'd on other grounds, 484 U.S. 231 (1988); and *United States* v. *Smith*, 521 F.2d 374, 377 (10th Cir. 1975) (the defendant bears the burden of proving that he is incompetent), with *Bilyew* v. *Franzen*, 686 F.2d 1238, 1244-1245 (7th Cir. 1982); *United States* v. *Hollis*, 569 F.2d 199, 203-207 (3d Cir. 1977); *United States* v. *DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States* v. *Makris*, 535 F.2d 899, 906 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977); and *United States* v. *Maret*, 433 F.2d 1064, 1067 (8th Cir. 1970), cert. denied, 402 U.S. 989 (1971) (holding that the prosecution bears the burden of proving that the defendant is competent). See also *Brown* v. *Warden*, 682 F.2d 348, 351-354 (2d Cir.) (upholding the constitutionality of a state law requiring the State to prove by a preponderance of the evidence that a defendant is competent), cert. denied, 459 U.S. 991 (1982); *Bruce* v. *Estelle*, 536 F.2d 1051, 1058 (5th Cir. 1976) (burden of proving incompetence rests on defendant in federal habeas corpus proceeding), cert. denied, 429 U.S. 1053 (1977); *Conner* v. *Wingo*, 429 F.2d 630, 637 (6th Cir. 1970) (same).

For the recent state court decisions, compare *Deason* v. *State*, 263 Ark. 56, 58, 562 S.W.2d 79, 81, cert. denied, 439 U.S. 839 (1978); *Flowers* v. *State*, 353 So. 2d 1259 (Fla. Dist. Ct. App. 1978); *Wallace* v. *State*, 248 Ga. 255, 258-259, 282 S.E.2d 325, 330,

cert. denied, 453 U.S. 927 (1981); *State* v. *Aumann*, 265 N.W.2d 316, 319 (Iowa 1978); *State* v. *Rogers*, 419 So. 2d 840, 842 (La. 1982); *State* v. *Chapman*, 104 N.M. 324, 327, 721 P.2d 393, 395 (1986); *State* v. *Pruitt*, 18 Ohio App. 3d 50, 54-55, 480 N.E.2d 499, 505 (1984); and *State* v. *Jacobs*, 51 N.C. App. 324, 328, 276 S.E.2d 482, 485 (1981) (holding that the burden of proof rests on the party asserting the defendant's incompetence), with *Diaz* v. *State*, 508 A.2d 861, 864 (Del. 1986); *People* v. *McCullum*, 66 Ill. 2d 306, 312-314, 362 N.E.2d 307, 310-311 (1977); *Commonwealth* v. *Crowley*, 393 Mass. 393, 400-401, 471 N.E.2d 353, 357-358 (1984); *State* v. *Bertrand*, 123 N.H. 719, 727-728, 465 A.2d 912, 916 (1983); *State* v. *Otero*, 238 N.J. Super. 649, 652-653, 570 A.2d 503, 505 (Law Div. 1989); *People* v. *Wright*, 105 A.D.2d 1088, 482 N.Y.S.2d 591, 592 (1984); *State* v. *Heger*, 326 N.W.2d 855, 858 (N.D. 1982); *State* v. *Jones*, 406 N.W.2d 366, 370 (S.D. 1987); and *Manning* v. *State*, 730 S.W.2d 744 (Tex. Crim. App. 1987) (holding that State must prove by a preponderance of the evidence that the defendant is competent to stand trial). See *Jolley* v. *State*, 282 Md. 353, 364, 371, 384 A.2d 91, 98, 101 (1978) (state law requires the prosecution to prove beyond a reasonable doubt that a defendant is competent to stand trial); 2 P. Robinson, *Criminal Law Defenses* § 208(c), at 505 (1984) (collecting cases holding that the burden of proof rests on the party asserting incompetence).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 912-024 40231

MOTION FILED
DEC 4 1991

No. 90-8370

In the

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brief for the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York as *Amicus Curiae* in Support of Petitioner and Motion for Leave to File Brief

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Question Presented

This brief addresses the question whether, consistent with the Due Process clauses of the Fifth and Fourteenth Amendments, the State may impose upon a defendant the burden of persuasion of proving his mental incompetence to stand trial by the greater weight of the evidence, where doubt as to competence has been declared by the trial court, and whether the State may impose a mandatory presumption that the defendant is competent after this doubt has arisen.

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In the

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TEOFILO MEDINA, JR.,

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STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York respectfully moves for leave to file the annexed brief *amicus curiae* on behalf of the petitioner in this case. The consent of the attorney for the petitioner was granted and a letter to that effect has been filed with the Clerk of the Court. The attorney for the respondent has refused consent for any *amicus curiae* briefs filed on behalf of petitioner.

The Association of the Bar has a long-standing tradition of involvement in the legal problems of the mentally ill and has authored many studies and reports that have been influential in persuading courts and legislatures to implement needed reforms in the treatment, care and disposition of the mentally ill. *See* Interest of Amicus, *infra*.

The interest of *amicus* in this case stems from the fact that the legal questions being raised, involving the appropriate standards of proof and burden of persuasion that

attend the determination of a criminal defendant's mental competence to stand trial, affect one of the most substantial interests affecting the mentally ill within the criminal justice system. As noted in our brief, the issue of competence to stand trial affects substantial numbers of offenders and is considered by many in the field to be the single most significant mental health inquiry pursued in the criminal justice system. Thus, the outcome of the Court's decision in this case may be expected to generate nationwide impact.

In addition, *amicus* brings to the attention of the Court an additional consideration that is not expected to be briefed and argued by the parties. While this case concerns the constitutionality of a California statute, the analogous federal statute in question, enacted in 1984, shares many of the same constitutionally-suspect features of the California statute. Accordingly, *amicus* would bring to the attention of the Court an important perspective that may not be addressed by the parties.

WHEREFORE leave to file a brief *amicus curiae* on behalf of the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York should be granted.

Dated: New York, New York
December 5, 1991

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1991
No. 90-8370

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Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Brief for the Committee on Legal Problems of the Mentally Ill of the Association of the Bar of the City of New York as *Amicus Curiae* in Support of Petitioner

Interest of *Amicus Curiae*

Founded in 1870, the Association of the Bar of the City of New York is one of the Nation's oldest and largest membership organizations of attorneys and members of the legal profession with over 20,000 members. It has achieved national recognition for its expertise and commitment to improving the civil and criminal justice systems and has submitted *amicus* briefs on many occasions before this and other courts in that regard. *See, e.g., United States v. Monsanto*, 491 U.S. 600 (1989).

The Association has a long-standing interest and involvement in addressing the legal problems of the mentally ill both within and without the judicial system and has

authored many studies and reports that have been influential in persuading courts and legislatures to implement needed reforms in the treatment, care and disposition of the mentally ill. *See, e.g.*, Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents, Association of the Bar of the City of New York, *Mental Illness, Due Process and the Criminal Defendant* (1968). *See also United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078, 1084-85 (2d Cir. 1969) (adopting Committee's 1968 recommendations) ("As a measure of its position as a respected initiator of needed reforms, we note that the Committee's prior report, made in 1962, led to substantial changes in the Mental Hygiene Law . . . particularly in . . . the procedures for involuntary civil commitment"); *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 167, 305 N.E.2d 903, 350 N.Y.S.2d 889, 893 (1973) (accord); *Fhagen v. Miller*, 29 N.Y.2d 348, 351, 278 N.E.2d 615, 328 N.Y.S.2d 393, 394 (1972) (accord).

Amicus has a long tradition of demonstrated interest in safeguarding the rights of the mentally ill along with preserving and strengthening our adversarial system of justice.

Summary of Argument

This Court has emphasized repeatedly that a criminal defendant's right not to be tried unless mentally competent is a core value protected by the Due Process clauses of the Fifth and Fourteenth Amendments. This case considers the constitutional propriety of the judicial procedures by which a determination of a defendant's competence shall be conducted.

The California statutory procedures for determining competence to stand trial are constitutionally flawed in significant respects. They create a mandatory rebuttable presumption that the defendant is competent—even after substantial doubt has arisen sufficient to warrant convening a jury to determine the issue. Moreover, the presumption is allowed to remain in the case even after substantial evidence rebutting it has been presented. In addition, California procedures require the possibly mentally ill defendant to overcome this mandatory presumption by proving his own mental incompetence by a preponderance of the evidence. This heavy burden of persuasion and its improper placement on a possibly incompetent defendant clearly violates the due process principles enunciated in *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975).

If the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, evidence firmly establishing competence must be of greater weight than that showing incompetence. There can be no ultimate burden of persuasion placed on the defendant to establish incompetence, particularly where —by virtue of mental illness—he may be disabled from meeting the very burden in question.

Moreover, whatever validity may attach to a presumption of competence insofar as it compels a party initially to produce evidence to rebut it, once that evidence has been presented, the presumption no longer has a proper place in the fact-finder's determination and should be removed from the case. Similarly, the mandatory character of the California statute's presumption is violative of the principles enunciated in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985).

I. The California statute offends due process insofar as it disallows a finding of incompetence unless proven by the greater weight of the evidence and places the burden of persuasion on the possibly incompetent defendant.

In *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975), this Court established the constitutional standard by which the trial court is required

to ensure that a defendant is mentally competent to stand trial and face charges. As the Court stated in *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) and reiterated in *Drope*, the due process rule against trying a mental incompetent is for the protection of a defendant who cannot effectively consult with counsel and cannot comprehend the nature of the proceedings against him.[1]

The purpose of the competency requirement is to guarantee accuracy and fairness of the proceedings, maintain dignity, and ensure that the defendant comprehends the impact of the charge and punishment. A. Stone, *Mental Health and Law: A System in Transition* 201, 204 (1976); A. Matthews, *Mental Disability and the Criminal Law* 19 (Am. Bar Foundation 1970); Note, *Incompetency to Stand Trial*, 81 Harvard L. Rev. 454, 457-58 (1967) (citing accuracy, fairness, dignity, and defendant's comprehension of process).[2]

[1] The frequent judicial blurring of the terms "incompetency" and "insanity" has been characterized by more than one commentator as "vexing." 3 M. Perlin, *Mental Disability Law: Civil and Criminal* § 14.03 at 208 n. 7 (1989). *See, e.g., Bruce v. Estelle*, 483 F.2d 1031, 1041-43 (5th Cir. 1973); *see also Pizzi, infra*, 45 U.Chi. L. Rev. at 50 n. 144.

The legal standard for determining competency to stand trial is, of course, distinct from the insanity defense. The issue of competency focuses on the defendant's mental state during trial. *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 378. In contrast, the insanity defense considers the defendant's mental condition at the time of the offense. *Lynch v. Overholser*, 369 U.S. 705, 715 (1962). "[T]he insanity defense and the matter of competence to stand trial are independent of one another because they involve [the defendant's] mental state at different times and because the ultimate questions are different." *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986).

[2] Significantly, while the insanity defense has received far greater public attention, the issue of competence to stand trial affects far greater numbers of offenders and is considered by many in the field to be the single most significant mental health inquiry pursued in the criminal justice system. It has been estimated that as many as 9,000 persons per year are found incompetent to stand trial and that some 25% of the defendants who raise the issue are, in fact, declared incompetent. H. J. Steadman, *Beating a Rap? Defendants Found Incompetent to Stand Trial* 4, 38 (1979). This is in dramatic contrast to the relative rarity with which the insanity defense is raised and the utterly miniscule number of instances in which it proves successful. *See* Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 922-23 & n. 3 (1985) ("It is estimated that for each defendant found not guilty by reason of insanity, at least one hundred defendants are determined to be incompetent to stand trial"); Perlin, § 14.02 at 207 n. 1 ("The numerical significance of incompetency determinations contrasts sharply with the remarkably few insanity defense cases adjudicated yearly").

To present a viable defense, a defendant must be able to aid his or her attorney in the preparation of that defense. The competency requirement is thus designed to ensure that this fundamental constitutional precept is valid in every case. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 22-23 (1977); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 Hastings L. J. 1053 (1977); Note, *Should the Burden of Proving Incompetence Rest on the Incompetent?* 64 Iowa L. Rev. 984, 985-86 (1979).[3]

Under the provisions of California Penal Code Sections 1368 and 1369, the trial court is required to conduct an inquiry into the defendant's competence at any time a doubt arises in that regard from any source. In this case, defense counsel moved for a hearing, claiming his client's present inability to cooperate with counsel (799 P.2d at 1288). As required under California law, the trial court

[3] Indeed, under *Pate* and its progeny, the trial court has a non-waivable obligation—irrespective of the concessions of counsel (*Tillery v. Eyman*, 492 F.2d 1056 (9th Cir. 1974); *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir. 1978))—to conduct an inquiry into a defendant's competence whenever evidence *from any source* raises a question in that regard.

convened a jury and held a hearing on defendant's competence.[4]

Significantly, the jury hearing the evidence of petitioner's mental incompetence was instructed, in accordance with Section 1369(f), that:

> It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous.

The California statute, in other words, creates both a mandatory rebuttable presumption of competence and then places the ultimate burden of proving incompetence on the defendant by a preponderance of the evidence. Accordingly, under the California standard, a jury would

[4] California is one of a minority of jurisdictions that assigns the determination of competence to stand trial to a jury instead of the trial judge. S. Brakel, J. Parry & B. Weiner, eds., *The Mentally Disabled and the Law* 693, 703 (3d ed. 1985) (Am. Bar Foundation Study); Note, *Incompetency to Stand Trial*, 81 Harvard L. Rev. at 455 & n. 8. *See also White v. Estelle*, 459 U.S. 1118, 1125-26 (1983) (Marshall, J., dissenting from denial of certiorari) ("While the jury may be equally qualified to make the findings of fact upon which the determination [of competency] must be based, I have little doubt that a judge ordinarily is better qualified to resolve the constitutional question on the basis of whatever facts are found. (Citation omitted). A judge is generally aware of what a defendant must do to participate in his defense. A judge may be guided by his reading of previous cases resolving questions of competency to stand trial and may develop useful experience in making the competency determination"). A paradigmatic example of the complexity and confusion that can attend jury determinations of competency may be found in *Bruce v. Estelle*, 483 F.2d at 1039-41.

The ABA Criminal Justice Mental Health Standards 7-4.7(c) (1986; rev. 1989) takes the position that "a jury determination of procedural competence is not constitutionally required, even though a deprivation of liberty is involved," *Commentary* at 207. It goes on to note that "[a] defendant's triability is a matter peculiarly within the province of a court, which has a special responsibility to resolve it." *Id.*

be compelled to find a defendant competent to stand trial despite substantial evidence of mental illness and incompetence merely because he has failed to meet the ultimate evidentiary burden of persuasion by the greater weight of the evidence.

This heavy burden of persuasion and its improper placement on the possibly incompetent defendant violates the due process principles enunciated in *Pate*, *Drope* and their progeny. Indeed, the overwhelming majority of jurisdictions that have considered this precise question have quite properly determined that to the extent either party has the burden of persuasion, it should be the prosecution, and the ultimate burden should be that the defendant be demonstrated to be competent to stand trial by the greater weight of the evidence. *See, e.g., United States v. DiGilio*, 538 F.2d 972, 986-89 (3d Cir. 1976); *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238, 1244-45 (7th Cir. 1982); *Brown v. Warden, Great Meadow Corr. Fac.*, 682 F.2d 348, 351-54 (2d Cir. 1982); *People v. McCullum*, 66 Ill.2d 306, 362 N.E.2d 307, 310-11 (1977); *Commonwealth v. Crowley*, 393 Mass. 393, 471 N.E.2d 353, 357-58 (1984); *State v. Bertrand*, 123 N.H. 719, 465 A.2d 912, 916-17 (1983); *Jolley v. State*, 282 Md. 353, 384 A.2d 91, 98 (1978); *State v. Jones*, 406 N.W.2d 366, 368-70 (S.D. 1987). (*See also* authorities collected in Justice Broussard's dissenting opinion in the Court below (799 P.2d at 1312-13)).

The *DiGilio* Court underscored that, if the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, evidence firmly establishing competency must be more persuasive than that showing incompetency. 538 F.2d at 988. Of necessity, then, there is no room for a rule of law placing the burden of persuasion on the defendant, particularly where—by virtue of mental illness—he may be disabled from meeting the very burden in question. This premise rests on two further principles:

> First, in order for a criminal proceeding to be fair, our system requires that a defendant be competent; and second, it would be both basically unfair as well as contradictory to say that a defendant who claims he is incompetent should be presumed to have the mental capacity to show that he in fact is incompetent. It simply cannot be assumed . . . that a defendant who may be incompetent possesses "sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp." Since there is an inconsistency in a position which expects the defendant to prove his own incompetency, and because the right not to stand trial if one is incompetent is of due process dimensions . . . "there is no room for a rule of law placing any burden of proof on the defendant" regarding the issue of his incompetency.

United States v. Hollis, 569 F.2d 199, 205 (3d Cir. 1977).

The Illinois Supreme Court has similarly assigned the burden of persuasion to the prosecution to establish competency by the greater weight of the evidence:

> Though the legislature has the authority to determine the allocation of the burden of persuasion, it may not allocate these burdens in a manner that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

People v. McCullum, 362 N.E.2d at 310. The same court had noted earlier in *People v. Bender*, 20 Ill.2d 45, 53-54, 169 N.E.2d 328, 332 (1960) that:

> It would be a strange rule, indeed, to impose upon [the defendant] the burden of proving his own incompetency, for the very disability which he would be seeking to prove renders him in-

> capable, either logically or legally, of sustaining the burden of proof.

The American Bar Association's recently promulgated Criminal Justice Mental Health Standards (1986; rev. 1989) have determined that the burden should not be placed on either party, but should be:

> If the court, after hearing the evidence, finds by the greater weight of the evidence that the defendant is competent to stand trial the matter should proceed to trial; if not, the court should proceed to issues of treatment or habilitation to effect competence.

ABA Standard 7-4.8(c)(ii).

In its Commentary on the allocation of the burden of persuasion at the hearing, the ABA Advisory Committee resolved the controversy by suggesting no assignment of the ultimate burden to either party but that, instead, the "hearing should find affirmatively that the greater weight of the evidence supports the court's competency determination." *Commentary* at 214-15. *See also* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 398-99 (1985) (discussing burden of proof and ABA recommendation that competence be established by greater weight of evidence).[5]

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[5] Paradoxically, at the same time the ABA standards were being promulgated, federal law with respect to the provisions for determining competence to stand trial changed in the opposite direction with the passage of the Insanity Defense Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984 (Act of Oct. 12, 1984, Pub. L. 98-473, Title II, 401-404, 98 Stat. 2067). Previous case law interpreting the predecessor statutory provision (18 U.S.C. § 4244) provided that the government bore the burden of proving a defendant competent by a preponderance of the evidence—*see, e.g., United States v. Makris*, 535 F.2d 899, 905-06 (5th Cir. 1976); *United States v. Hollis*, 569 F.2d 199, 205 (3d Cir. 1977); *United States ex rel.*

In determining how the "risk of error [should] be allocated"—in deciding the constitutionally appropriate standard of proof and establishing which party should bear the applicable burden of persuasion—this Court has set forth three principal elements to be considered in determining whether a challenged governmental procedure meets the core requirements of due process: (1) the individual's interest affected by the procedure; (2) the risk of erroneous deprivation created by the procedure; and (3) the countervailing governmental interest supporting use of the suspect procedure. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982); *Addington v. Texas*, 441 U.S. 418 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *In re*

S.E.C. v. Billingsley, 766 F.2d 1015, 1022 (7th Cir. 1985). The newly enacted 18 U.S.C. § 4241(d) provides, however, that:

> If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the Court shall commit the defendant to the custody of the Attorney General.

The fundamental change this new federal statute makes in shifting the burden of persuasion from competence to incompetence has been the subject of serious criticism:

> [T]he proposed statute apparently intends to reverse the present "burden of proof" by requiring the court to find "by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent." Even the present law under section 4244 seems preferable to this change in burdens of proof. The new statute misconceives the responsibility of the trial court. It will permit the court to try a defendant even if the court, after having heard the evidence, remains uncertain as to the defendant's competency.

Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U.Chi. L. Rev. at 65-66. *See also United States v. Turner*, 602 F.Supp. 1295, 1300 (S.D.N.Y. 1985) (noting statutory shift in burden of proof).

Winship, 397 U.S. 358, 363-68 (1970). *Winship* also examines an additional element—the importance that historically has been attributed to the procedural factor being challenged. 397 U.S. at 361-63.

From a historical perspective, few principles are as firmly embedded in Anglo-American criminal jurisprudence as the doctrine that an incompetent defendant may not be put to trial. The common law origins of the incompetency doctrine date back to mid-seventeenth century England. *See, e.g.*, 4 W. Blackstone, *Commentaries* 24, 395 (9th ed. 1783); 1 M. Hale, *The History of the Pleas of the Crown*, 34-35 (1736); 3 Coke, *Institutes* 6 (1644); *Frith's Case*, 22 How. St. Tr. 307 (1790); *Kinloch's Case*, 18 How. St. Tr. 395 (1746); and further historical authorities collected in *United States v. Masthers*, 539 F.2d 721, 725 n. 23 (D.C. Cir. 1976) (Bazelon, C.J.); Winick, 32 UCLA L. Rev. at 952; Brakel, *ABF Study* at 694-95; Note, 64 Iowa L. Rev. at 992; and Perlin §§ 14.02-.03.

Historical commentators focused primarily on (1) the incompetent defendant's inability to aid in his defense; (2) the parallels to the historic bans on trials *in absentia;* and (3) the problems raised by defendants who remained mute and could not meaningfully plead to the charge and participate in the ritual of the common law trial. *Id.*

Indeed, this Court's *Dusky* formulation—applicable in the state and federal courts for the last thirty years—was derived from the common law "understand and assist" standard of mental competency, which had been used in the federal courts as early as 1899 in *Youtsey v. United States*, 97 F. 937, 946 (6th Cir. 1899) and 1906 in *United States v. Chisolm*, 149 F. 284, 287 (S.D. Ala. 1906). *See* Pizzi, 45 U. Chi. L. Rev. at 21-23 (discussing *Youtsey* and *Chisolm*); Silten & Tullis, 28 Hastings L. J. at 1059; *see also* Winick, 32 UCLA L. Rev. at 923 n. 4 (discussing common law origins); Perlin § 14.03 (tracing history); and Note, 81 Harvard L. Rev. at 454 & n. 1.

Given its historic pedigree, it is beyond question that the defendant's right not to be tried while incompetent, much like the reasonable doubt standard in *Winship*, "plays a vital role in the American scheme of criminal procedure" (397 U.S. at 363) and has a long history of acceptance as a core principle of fundamental fairness in the administration of criminal justice in this country.

Moreover, a second *Winship* factor cautions strongly that there is a significant risk of error in the accuracy of the adjudicatory process by placing the burden of proof on the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 686 (1975). The chance of an erroneous competency determination (and subsequent conviction) is arguably increased because of the nature of what the defendant is required to prove. The California statute assumes the negative of the fact the defendant must rebut and overcome. The defendant is thus given the burden of proving that he is unable to aid his attorney in presenting a defense. However, if the defendant is, in fact, unable to aid his attorney in preparing a defense, there is similarly little reason to believe that the defendant will be able to aid the attorney in establishing his incompetence. *DiGilio*, 538 F.2d at 988; *Bilyew*, 686 F.2d at 1245; and Justice Broussard's dissent in the Court below (799 P.2d at 1310-17).

As one commentator has aptly summed up the defendant's dilemma (64 Iowa L. Rev. at 991):

> In short, the state has placed on the defendant the burden of proving a fact that, if true, may be very difficult for the defendant to prove. Because of the statutory allocation of burden of proof, the chances of a truly incompetent defendant being found *competent* to stand trial are significantly increased. Once at trial, the defendant who is erroneously found competent is less likely to be acquitted. The truly incompetent defendant's inability to aid his or her attorney in presenting a defense virtually places that defendant at the mercy of the court. Consequently, the risk of error at a competency hearing is intimately related to the risk of erroneously depriving the incompetent defendant of important personal interests (emphasis in original).

Nor do the cases relied upon by the Court below—*Leland v. Oregon*, 343 U.S. 790 (1952); *Patterson v. New York*, 432 U.S. 197 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1977)—mandate a different result. In those cases, the Court was concerned with the constitutional implications of the States' power to define the substantive elements of crimes within their jurisdiction and the degree of permissible burden shifting the States may constitutionally impose on defendants with respect to proving such affirmative or intent-negativing defenses as insanity, absence of malice and extreme emotional disturbance. *See* Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. Rev. 637, 673-83 (1978) (discussing impact of *Rivera* on *Leland*, *Patterson*, *Mullaney* and *Winship*). *See also* Note, 64 Iowa L. Rev. at 996-98 (discussing *Rivera's* inapplicability in the incompetency context). These cases are manifestly irrelevant to the degree of procedural due process to which a defendant is entitled to safeguard his fundamental right not to be tried while mentally incompetent—a core due process protection guaranteed in *Pate* and *Drope*. The competency requirement—in contrast to the insanity defense—is not directly related to the defendant's culpability. Its primary function is to ensure that a defendant may properly exercise his constitutional rights during the course of the trial proceedings in which his culpability and blameworthiness are to be determined.

It remains a subject of arguable debate whether—and, if so, under what procedural formulations—the States are constitutionally compelled to provide an insanity defense as an exculpatory or mitigating feature of its substantive criminal jurisprudence. *See, e.g.*, A. Goldstein, *The Insanity Defense* (1967); N. Morris, *Psychiatry and the Dan-*

gerous Criminal, 41 S. Cal. L. Rev. 514 (1968); and Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. Cal. L. Rev. 779 (1985).

After *Pate* and *Drope*, however, it is beyond any and all debate that a defendant has an overriding constitutional right—firmly grounded in the Due Process clauses of the Fifth and Fourteenth Amendments—*not* to be compelled to stand trial while mentally incompetent. Perforce he has the correlative right to constitutionally adequate procedures by which this right properly must be safeguarded. *Drope*, 420 U.S. at 181; *Pate*, 383 U.S. at 385. As noted by the New Hampshire Supreme Court in precisely this context (*State v. Bertrand*, 465 A.2d at 916):

> [W]e perceive no inconsistency in placing upon the State the burden of proof that the defendant is competent at the time of trial and placing upon the defendant the burden of proof that he was insane at the time of the offense (citation omitted) . . . federal due process mandates that a defendant not be tried for the offense while he is mentally incompetent (citations omitted).
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> . . . We believe that a necessary ingredient of that constitutional mandate is that the burden rest upon the state to prove the defendant's *competency* to stand trial (emphasis in original).

Nor may the courts place the burden of proof on the defendant simply on the basis that he has the greatest access and familiarity with the evidence of his own mental incompetency. As *Pate* and *Drope* make clear, the trial court has an independent and nonwaivable duty to determine the mental competence of a defendant—an obligation of due process dimensions. Accordingly, a defendant may be compelled to submit to psychiatric and judicial evaluation to determine competency to stand trial notwithstanding his Fifth Amendment rights.

In *Estelle v. Smith*, 451 U.S. 454, 465 (1979), this Court determined that a defendant may be compelled to submit to psychiatric evaluations with respect to his competency to stand trial so long as the results were used solely for that purpose and did not generate evidence for the prosecution at the guilt phase or penalty phase of trial (*id.* at 468-69):

> If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

See also Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. Crim. L. & Crimin. 943, 947 & n. 21, 951-52, 966-67, 971-74 (1983) (suggesting *Simmons* and *Kastigar* use-immunity for statements made during compelled competency determinations).[6]

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[6] *Estelle*, of course, is not exactly a precedent-shattering expansion of the law on this point. Several Circuits have held that, consonant with the Fifth Amendment, a defendant may be compelled to submit to a psychiatric determination of competency to stand trial but that the evidence adduced is inadmissible at trial on the issue of mental responsibility. *See especially Battie v. Estelle*, 655 F.2d 692, 700-1 (5th Cir. 1981); *United States v. Alvarez*, 519 F.2d 1036, 1042-45 (3d Cir. 1975); *United States v. Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973); *United States v. Driscoll*, 399 F.2d 135 (2d Cir. 1968). Indeed, recent federal law has statutorily codified the *Estelle* prohibition. 18 U.S.C. § 4247(g). *See* S. Rep. No. 98-225, at 238, 1984 U.S. Code Cong. & Admin. News at 3420.

The ABA Standards similarly forbid the use of information obtained from a defendant during the course of a competency determination for any other purpose in the criminal process. *See* ABA Standards 7-4.6(a). *See also* Bennett, 53 Geo. Wash. L. Rev. at 406.

Accordingly, it is axiomatic that given the fundamental due process values protected by the constitutional requirement that a defendant not be tried unless competent to stand trial, the burden of proof must be that *competence* be established by the greater weight of the evidence. ABA Standards 7-4.8(c)(ii).

With respect to the precise quantum of proof to be constitutionally required, the lower courts have differed substantially—some requiring preponderance of the evidence while others demand proof beyond reasonable doubt. *Compare State ex rel. Matalik v. Schubert*, 57 Wisc. 315, 327, 204 N.W. 2d 13, 18 (1973) (beyond reasonable doubt); *Jolley v. State*, 384 A.2d at 98 (reasonable doubt); *State v. Aumann*, 265 N.W.2d 316, 320-23 (Iowa 1978) (Mason, Rawlings and McCormick, JJ., dissenting) (reasonable doubt) *with United States v. DiGilio*, 538 F.2d at 988 (collecting cases) (preponderance). To the extent that this Court has dealt with preliminary fact determinations and admissibility of evidence at trial, it has favored the preponderance of the evidence standard. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 687 n. 5 (1988); *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986); *Lego v. Twomey*, 404 U.S. 477, 488 (1972).

Nevertheless, this Court has recognized that the mentally ill have a substantial liberty interest of such weight and gravity that warrants a higher standard of proof than mere preponderance of the evidence. *Addington v. Texas*, 441 U.S. 418, 423-25 (1979). Accordingly, this Court has imposed an intermediate "clear and convincing" evidence requirement where the liberty interests of the mentally ill are at stake. Indeed, the American Bar Foundation Study has suggested that this more rigorous standard of proof may apply to competency determinations as well, since a finding of incompetency often results in involuntary hospitalization. Brakel, *ABF Study* at 703 (collecting authorities). Moreover, where important constitutional policies

are involved, the standard applicable to burdens of proof placed on the government frequently depend upon the perceived social utility and deference to be accorded these rights. *See* Edmund Morgan, *Basic Problems of Evidence* § 2.07 at 38 (6th ed. M. Martin 1988). All of these factors suggest that the liberty interests at stake may call for a higher degree of reliability in apportioning the risk of error than a mere preponderance of the evidence.

In *Santosky v. Kramer*, 455 U.S. at 755, a case which upheld the "clear and convincing" standard (albeit in a different context), the Court determined that:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Given the respective interests at stake in these proceedings, the Court may well find it prudential to afford the lower courts the first opportunity to reconsider the quantum of proof appropriate to accommodate the parties' divergent interests. Nevertheless, as an irreducible constitutional minimum, the Court should hold—in conformance with the ABA Standards—that the minimum quantum of proof should be the "greater weight of the evidence" establishing the defendant's mental competence.

II. California's mandatory presumption of competence is incompatible with due process as it constitutes an impermissible burden-shifting impediment to the ultimate determination of mental competence.

Both the majority and dissenting opinions below (799 P.2d at 1289 & 1311 n. 1) agree that California Penal Code Section 1369(f) provides that the jury deciding a defendant's mental competence to stand trial must be instructed that:

> It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent.

Petitioner's competency jury was so instructed in this case (799 P.2d at 1311 n. 1).

Under the California system, the presumption of competency imposes not merely a burden of production on the defendant—it thereafter continues in the case as a specie of evidence, acting as a mandatory rebuttable presumption affecting the ultimate burden of persuasion that the defendant must overcome.[7]

The law governing constitutionally permissible uses to which inferences and presumptions may be put in instructing the jury in making preliminary and ultimate factual determinations has not run an entirely clear course in this Court. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985); *Rose v. Clark*, 478 U.S. 570 (1986); *Pope v. Illinois*, 481 U.S. 497 (1987); *Carella v. California*, 491 U.S. 263, 268-73 (1989) (jury instructions creating certain mandatory presumptions which impermissibly shift the burden of proof from the prosecution to the defense with respect to intent or other essential elements of the criminal offense are constitutionally suspect).

In *Sandstrom v. Montana*, 442 U.S. at 513, this Court held that a trial court's jury instruction that "[t]he law

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[7]*Compare Taylor v. Kentucky*, 436 U.S. 478 (1978) where this Court, in contrast, reiterated that while instructing a jury on the presumption of innocence is appropriate, instructing them that the presumption itself is a form of evidence has "a tendency to mislead." *Id.* at 485 & n. 12 (and authorities collected therein). *See also Rules of Evidence, 1974: Hearings on H.R. 5463 Before Senate Comm. on Judiciary*, 93rd Cong., 2d Sess. 56 (1974) ("Presumptions are not evidence, but ways of dealing with evidence"); California law formally recognizes this distinction. Cal. Evid. Code § 600 ("A presumption is not evidence").

presumes that a person intends the ordinary consequences of his voluntary acts" created an unconstitutional mandatory presumption on the element of intent. 442 U.S. at 515. The Court held that this instruction deprived the defendant of due process because it was susceptible to an interpretation that removed the prosecution's burden of proving the element of intent beyond a reasonable doubt. *Id.* at 524. *See also Yates v. Aiken*, 484 U.S. 211, 214 (1988) (instruction that malice implied from use of deadly weapon unconstitutionally removed States' burden of proving intent).

Subsequently, in *Francis v. Franklin*, 471 U.S. at 315-18, the Court underscored that a *Sandstrom*-type instruction was unconstitutional even when accompanied by an explicit reminder that the presumption was rebuttable (*id.* at 314):

> The challenged sentences are cast in the language of command. They instruct the jury that "acts . . . *are presumed* . . . " and that a person "*is presumed* to intend . . . " These words carry precisely the message of the language condemned in *Sandstrom*. (Emphasis in original).

Although Franklin's jury, unlike Sandstrom's, was explicitly told that the presumptions "may be rebutted" (471 U.S. at 318), the Court nonetheless determined that such cautionary language was insufficient to vitiate the taint, as it may have been understood merely as suggesting that the defendant had an affirmative ultimate burden of persuasion after the State had proven the basic underlying acts (471 U.S. at 317):

> [Even h]ad the [*Sandstrom*] jury reasonably understood the instructions as creating a mandatory *rebuttable* presumption the instructions would have been no less constitutionally infirm (citation omitted).

• • •

> A mandatory rebuttable presumption does not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional (emphasis in original).

See also Carella v. California, 491 U.S. at 265-66.

In this case, it is axiomatic that California has created a similarly mandatory—albeit arguably rebuttable—presumption of competency. *See* § 1369(f) ("It shall be presumed . . . unless . . . "). It affects not only the defendant's burden to produce evidence in rebuttal but it also continues in the case as having independent evidentiary and potentially dispositive weight even after the defendant has produced sufficient rebuttal evidence.[8]

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[8] *Ulster County Court* divided mandatory presumptions into two kinds (442 U.S. at 157 n. 16):

> Presumptions that only shift the burden of production to the defendant, returning the ultimate burden of persuasion to the prosecution if the defendant meets his burden of production; and presumptions that entirely shift the burden of proof to the defendant.

See also Francis v. Franklin, 471 U.S. at 314 n. 2 ("A mandatory presumption may be either conclusive or rebuttable . . . . A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted") (citing *Sandstrom*, 442 U.S. at 517-18).

Manifestly, the California statute is of the mandatory rebuttable variety, irrevocably shifting to the defendant the ultimate burden of production and persuasion. *See* Comment, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by Allen*, 42 U. Miami L. Rev. 1009, 1020-22, 1025-28 (1988).

Whatever constitutional validity such a presumption may have as placing upon the defendant an initial burden of production—although *cf. Francis v. Franklin*, 471 U.S. at 314 n. 3—nevertheless, once such evidence has been presented, the presumption should thereupon be out of the case and should not be relied upon either by the prosecution or the trier of fact. *See* Eule, *The Presumption of Sanity*, 25 UCLA L. Rev. at 691-98.

While the presumptions of sanity and competency have sometimes been improperly conflated—they are, of course, analytically distinct—it is nevertheless common ground that the presumptions have the procedural consequence of shifting the initial burden of production on to the defendant. *See generally* 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 300[01] at 300-2 to 300-5 (1982). Under the so-called *"Thayer"* rule—which has been adopted by the American Law Institute in its Model Code of Evidence [Rule 704(2)] and is favored by most authorities in the field of evidence (*e.g.*, 9 Wigmore, *Evidence* § 2491 (Chadbourn rev. 1981))—"fixing the duty of going forward with proof . . . and this alone, appears to be characteristic and essential work of the presumption." Thayer, *A Preliminary Treatise on Evidence at the Common Law* 337 (1898). Once this initial standard has been met, the presumption disappears like a "bursting bubble" and, being no longer in the case, is not to be mentioned to the jury at all. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976) (applying *Thayer's* theory); *see especially United States v. Hendrix*, 542 F.2d 879, 881-82 (2d Cir. 1976) (collecting federal cases on presumption of sanity and adopting *Thayer* rule); *United States v. Andrew*, 666 F.2d 915, 917-18 (5th Cir. 1982) (collecting cases). *See also* Eule, 25 UCLA L. Rev. at 696 & nn. 301-2.

The pernicious danger of allowing juries to consider a mandatory presumption of competence after evidence rebutting it has been admitted is the virtual certainty that they

will continue to count the presumption against the defendant rather than weighing strictly the evidence actually adduced on the merits of the controverted factual question. Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 Harvard L. Rev. 1574, 1576 n. 9 (1981) ("jury instructions embodying criminal presumptions always introduce unconstitutional irrationality into the criminal process. Such instructions abstract a single fact (the presumption's predicate) from the broader factual matrix of the case, and then authorize an inference beyond reasonable doubt from the predicate to the presumption's conclusion"), *discussing* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harvard L. Rev. 1187 (1977).

Jury instructions on presumptions have been characterized as disguised comments on the evidence and manipulations of the burden of persuasion on the presumed fact. Reliance upon such presumptions after evidence rebutting it has been introduced is seen as injecting "an irrational component into the jury decisionmaking process" R. Allen, *Presumptions in Civil Actions Reconsidered*, 66 Iowa L. Rev. 843, 856-59 (1981). This danger is recognized as being particularly prejudicial to the defendant in the criminal context (R. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Approach to Evidentiary Devices*, 94 Harvard L. Rev. 321, 331-32 (1980)):

> The judge's comment increases the chance of conviction by enhancing the effect of the state's evidence. In order for the defendant to have the same chance of acquittal . . . . he would have to adduce more persuasive rebuttal evidence than that advanced in the . . . case [in which no inference or presumption was mentioned]. Although the formal relationship between the state and the defendant has remained the same—the jury has applied the reasonable doubt standard in each case—the comment has modified what may profitably be called the relative burdens of persuasion by altering the factual matrix within which the jury reached its decision. The effect of judicial comment, then, is to shift the positions of the parties by modifying the relative burden of persuasion that a defendant bears on an issue just as with affirmative defenses and placement of the burden of production.[9]

In this case, of course, the danger is that where the evidence of competency and incompetency may have been in a state of equipoise, the jury might well have utilized the presumption simply to mechanically tip the scales against a defendant whose mental competence is demonstrably dubious at best. *See, e.g., Bilyew*, 686 F.2d at 1245-46; *DiGilio*, 538 F.2d at 988. Thus, the inherent danger of instructing jurors in terms of such mandatory presump-

[9] Indeed, recent studies suggest that judicial instructions on presumptions and inferences have a disproportionate impact and may, in effect, communicate a "mandatory" rule of law to the jury either because of the general aura of legal authority surrounding the presumption or through the formal rhetoric by which it is conveyed. *See* Note, *The Improper Use of Presumptions in Recent Criminal Law Adjudication*, 38 Stanford L. Rev. 423, 439, 441-42, 453-54, 456 (1986). In a series of empirical studies—including Stanley Milgram's experiments on the effects of authority on obedience (*id.* at 442-46) and Rita James Simon's studies with experimental juries on the effect of legal rules on verdicts (*id.* at 447-50)—the preliminary results suggest that the authority with which a presumption is communicated can strongly orient—or, if necessary, reorient—the jurors' decisionmaking processes so as to bring them into conformity with the presumption. *Id.* at 450. As the Stanford commentator concludes (38 Stan. L. Rev. at 456):

> Taken together, the empirical and legal analyses strongly suggest that the "dignifying formalities" of an authoritative legal presumption carry significant weight with juries and reduce their sense of responsibility and moral sensitivity. An aura of authority, professionalism, and experience surrounds permissive presumptions because they have been found sufficiently reasonable and reliable to receive the official legal imprimatur of the state.

tions is that their validity is "logically divorced from [the particular facts presented by the State] and based [instead] on the presumption's accuracy in the run of cases." *Ulster County Court*, 442 U.S. at 159.

Accordingly, once facts rebutting the presumption were produced—as was done here when the trial court determined there to be sufficient grounds to warrant empaneling a jury to make formal inquiry into petitioner's competence and substantial controverted evidence was subsequently adduced at the competency hearing before the jury—the presumption should have disappeared from the case rather than having lingered to impermissibly tip the scales against the defendant. As Professor Eule has put it (25 UCLA L. Rev. at 698):

> [Once evidence rebutting the presumption of sanity has been introduced] the continued evidentiary role of the presumption cannot be tolerated. It is one thing to believe that jurors will inevitably draw the inference on their own; it is quite another to put the prestige of the court behind such ill conceived and potentially confusing notions.

Coupled with the unconstitutional placement of the ultimate burden of persuasion onto the petitioner, the California statute's creation of a mandatory presumption of competence deprived him of a fair and factually accurate assessment of the merits of his claim of mental incompetency—an assessment unencumbered by discredited legal fictions such as "presumptions of competency.[10]

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[10] *See* Note, 38 Stan. L. Rev. at 461:

> Legal doctrine becomes socially invalid when it depends on assumptions about human nature that do not stand up to modern scientific scrutiny. Removing the mandatory-permissive distinction would help to focus reviewing courts' attention on a less fact-specific dispute—whether the presumption is empirically valid.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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This brief is dedicated to the memory of Robert Kasanof, a member of the Bar of this Court as well as the Association of the Bar of the City of New York, for his lifelong commitment to the cause of Equal Justice Under Law.

Supreme Court, U.S.
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No. 90-8370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment forbid a state from employing the common law presumption of sanity in a proceeding to determine competency to stand trial?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TEOFILO MEDINA, JR.,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner asks this Court to strike down a state evidence rule of long standing based on an open-ended test of due process which would subject state procedures to virtually limit-

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1. CJLF has received written consent of the parties to file this brief.

less scrutiny by federal courts. The resulting expense and delay would be contrary to the rights of victims and society which CJLF was formed to protect. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

> "From October 13 to November 7, 1984, defendant engaged in a crime spree, stealing a gun from a pawnshop, holding up two gas stations, a drive-in dairy, and a market, killing three employees of these establishments (Horacio Ariza, Douglas Metal and Victor Rea), attempting to rob a fourth employee (Moon Yoon), and shooting at two citizens (Cynthia Police and Daniel Barrow) who attempted to follow his getaway car.
>
> "Defendant was apprehended after police traced his car to his residence. Police found a gun in defendant's home that, according to prosecution experts, was used to fire the bullets found in the three murder victims. Although other family members lived with defendant, the testimony of his two sisters indicated the gun belonged to him.
>
> "Defendant challenged some of the circumstantial evidence linking him to the crimes, but (other than asserting an insanity defense) he neither denied his guilt nor offered any alibi defense." *People* v. *Medina*, 51 Cal. 3d 870, 879, 799 P. 2d 1282 (1990).

At a hearing on Medina's competency to stand trial, expert testimony was in conflict. The jury found him competent. *Id.*, at 879-880. The California Supreme Court rejected Medina's contention that the statutory presumption of competence is unconstitutional, *id.*, at 881-886, and affirmed the judgment in its entirety, *id.*, at 913. This Court granted certiorari limited to the competency question. *Medina* v. *California*, 116 L. Ed. 2d 276 (1991).

SUMMARY OF ARGUMENT

The common law did not place an affirmative burden on the prosecution to prove competency as a condition for putting the defendant on trial. California's use of the presumption of sanity in competency proceedings appears to be consistent with the common law.

If a rule of evidence does not affect any specific guarantee of the Bill of Rights, is not contrary to any established tradition, and is not contrary to a truly fundamental principle essential to a fair trial, then the Due Process Clause does not interfere with the state's decision. Defendant's call to invoke the boundless, subjective test of *Mathews* v. *Eldridge* in this context should be flatly rejected.

California's rule is consistent with basic principles of evidence. It places the burden on the party who wishes to depart from the normal course and, where defendant is the movant, has superior access to the evidence.

Constitutionalizing rules of evidence is undesirable and should be avoided. Where the rule is not truly fundamental, raising it to constitutional stature creates unnecessary delay and expense.

ARGUMENT

I. The common law did not place a burden of proof on the prosecution as to competency.

The common law treatises are consistent in their description of the law of insanity at the time of trial. Insanity at any point would halt the proceedings. Hale's description aptly summarizes the common law:

> "If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that

incapacity be removed; the reason is because he cannot advisedly plead to the indictment . . . . And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he becomes of *non sane memory*, he shall not receive judgment; or, if after judgment he becomes of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution. [Citation.]

"But because there may be great fraud in this matter, yet if the crime be notorious, as *treason* or *murder*, the judge before such respite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit." 1 M. Hale, *The History of the Pleas of the Crown*, 34-35 (Stokes & Ingersoll ed. 1847) (emphasis in original, footnote omitted); accord 4 W. Blackstone, *Commentaries* 24-25 (1st ed. 1769); 1 J. Chitty, *A Practical Treatise on the Criminal Law*, 761 (5th Am. ed. 1847).

The early authorities do not appear to provide any explicit guidance on the instructions given to the jury in this special proceeding. With no special rule applicable, it seems likely that the jury was instructed on the usual rule regarding insanity. "In presumption of law, every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil as criminal." 1 Hale, *supra*, at 33.

Defendant has cited no pre-independence authority that the presumption of sanity did not apply to competency to stand trial, and amicus has found none. *Regina* v. *Turton*, 6 Cox C. C. 385 (1854) applied the presumption of sanity, referring to that rule as "the old practice."

Defendant cites *The King* v. *Steel*, 1 Leach 451, 168 Eng. Rep. 328 (1787) for the proposition that a person who had been *proven* "mute by visitation of God" was presumed mentally defective unless the prosecution proved otherwise. Pet. Brief 37. From this, defendant draws the conclusion that

"immediately before the Constitution was adopted, the English practice placed the burden of proof of capacity to plead on the prosecution." *Ibid.*

Amicus submits that the correct interpretation of *Steel* is exactly the opposite. Presumptions were devices used by the common law for two purposes: to initially place the burden of proof on one party, without any evidence, and to shift the burden to the *other* party upon proof of certain predicate facts. See Law Revision Commission comment to Cal. Evid. Code § 500, reprinted in 9 J. Wigmore, *Evidence* § 2486, n. 3, 289-290 (Chadbourn rev. 1981).[2]

There would be no reason for a presumption of incompetency from muteness operating to *shift* the burden to the party claiming competency unless the burden was initially on the party claiming incompetency. The implication of *Steel* is that, with the very limited knowledge of disabilities available at the time, a showing of muteness was thought sufficient to establish a *prima facie* case of incompetency. It follows that the party asserting incompetency must have had the burden of establishing such a case. That is, prior to the showing of muteness the usual presumption of sanity was in effect.

On the whole it seems that the concept of "burden of proof" in the sense we think of it today was considered far less significant at common law. Even the rule of proof beyond a reasonable doubt on the issue of guilt did not crystallize until the 1790's. *In re Winship*, 397 U. S. 358, 361 (1970).

The proceedings on competency seem to have been even less formal. A nineteenth century commentator paints a picture of a very loose, flexible proceeding:

"The object of this inquiry being, in the main, to in-

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2. Modern authorities disapprove of the former use, preferring to state the burden of proof explicitly. See *ibid.*

> form the judge, it seems that he need not limit the evidence by strict rules. The prisoner, for example, may be permitted to make statements and observations to the court and the jury, and what the latter see and hear of him they may take into the account. He cannot challenge jurors peremptorily, but he may for cause. The hearing, it would appear, may, if the judge deems best, be in private." 2 J. Bishop, *Criminal Procedure* § 668, 302 (3d ed. 1880) (footnotes omitted).

Defendant cites *Regina* v. *Davies*, 3 Cor. & K. 328, 329, 175 Eng. Rep. 575 (1853) for the proposition that "lies on the prosecution" to prove competency. Yet the statement defendant quotes is counsel's argument, not the holding of the court. *Ibid.* The court's holding simply deals with the order of proof, not the burden. "I do not consider this so much an issue joined as a preliminary inquiry for the information of the Court." *Ibid.* The holding is in accord with Bishop's description of an informal inquiry. *Regina* v. *Turton*, *supra*, 6 Cox C. C., at 385, rejected defense counsel's citation of *Davies* for fixing the burden of proof. *Freeman* v. *People*, 4 Denio 9, 47 Am. Dec. 216, 218-228 (N.Y. Sup. Ct. 1847) discusses the early authorities at length without reaching any definite conclusion on the burden of proof.

In summary, then, it appears that the early authorities provide little or no explicit guidance on a formal assignment of the burden of proof as such. There appears to be little doubt, though, that the general presumption of sanity applied. Certainly the defendant had no right to an instruction placing the burden on the prosecution. California's codification of the common law presumption of sanity, Cal. Penal Code § 1369(f), is consistent with the common law and does not violate any established American legal tradition.

II. Absent a specific federal right, a traditional right, or an essential rule, the Due Process Clause leaves evidence questions to the states.

The procedure adopted by a state "does not run foul of the Fourteenth Amendment because another method may seem to [this Court's] thinking to be fairer or wiser *or to give a surer promise of protection* to the prisoner at the bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934) (emphasis added). At bottom, petitioner's argument is a call for this Court to reject Justice Cardozo's wisdom and do precisely what *Snyder* declined to do.

The incorporation doctrine has narrowed the scope of the *Snyder* principle, to be sure. *Snyder*'s statements about jury trial and self-incrimination, *ibid.*, are no longer true. Thus in *Jackson* v. *Denno*, 378 U. S. 368, 395-396 (1964), the Court struck down a New York procedure for determining the voluntariness of confessions because that procedure failed to adequately protect a specific federal constitutional right.

Justice Harlan carefully explained the distinction in his opinion for the Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967). "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565. *Spencer* declined to require a bifurcated trial when the defendant is charged under a habitual criminal statute, even though most people would agree that bifurcation is the better approach. See *id.*, at 567-568.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States *to promulgate their own rules of evidence* to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

This Court has, of course, mandated a large number of evidentiary rules to enforce the specific guarantees of the Bill of Rights. The Fourth Amendment rules fill a four-volume treatise. See generally W. LaFave, *Search and Seizure* (2d ed. 1987). In the self-incrimination area, this Court has stacked prophylactic rules on top of rules to draw bright lines far beyond the original reach of the privilege. See, *e.g.*, *Arizona* v. *Roberson*, 486 U. S. 675, 681 (1988). Absent a specific guarantee, however, the situation is quite different.

In *Dowling* v. *United States*, 493 U. S. 342 (1990), the Court was presented with the same type of question as in the present case: whether it is acceptable to deal with the evidentiary problem at hand through a nonconstitutional source, such as the Federal Rules of Evidence or the California Penal Code, or whether the procedure in question "is so extremely unfair" that its use "violates 'fundamental conceptions of justice.' " *Id.*, at 352 (citation omitted). "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has *limited application*. We, therefore, have defined the category of infractions that violate 'fundamental fairness' *very narrowly*." *Ibid.* (emphasis added); accord, *Estelle* v. *McGuire*, 60 U. S. L. W. 4015, 4018 (Dec. 4, 1991).

For the most part, the considerations set forth in *Spencer* and *Dowling* have resulted in the rejection of attempts to interfere in evidentiary matters outside the scope of the specific guarantees of the Bill of Rights. The principal exception has been the line of cases involving the presumption of innocence and proof beyond a reasonable doubt.

In re Winship, 397 U. S. 358 (1970) held that proof beyond a reasonable doubt was a requirement of due process. This requirement went back to "our early years as a Nation," *id.*, at 361, if not to the common law. Similarly, *Morissette* v. *United States*, 342 U. S. 246, 275 (1952) implied and *Sandstrom* v. *Montana*, 442 U. S. 510, 522 (1979) held that the long-standing rule of presumption of innocence was included in "due process."

Medina's proposed rule, however, falls into a third category. It is neither a specific guarantee of the Bill of Rights nor a tradition going back to the early days of American jurisprudence. Decisions incorporating such rules into the Due Process Clause are few and far between, for good reason.

In this third category, only a few rules which go directly to the heart of the accurate determination of guilt or innocence have been accepted by this Court. *Mooney* v. *Holohan*, 294 U. S. 103 (1935) held that the knowing use of perjured testimony violated due process. *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) held that the suppression of exculpatory evidence was essentially equivalent. *Ake* v. *Oklahoma*, 470 U. S. 68 (1985) required access to psychiatric assistance where the defense was insanity. The critical evidence was inaccessible to the defendant without expert assistance. *Id.*, at 80.

In each case, there was a direct, major distortion of the evidence on the central issue of guilt. The present case, in contrast, is two steps removed from the central issue. The placement of the burden on the defense *might* result in the trial of a borderline incompetent defendant,[3] who in turn *might* have otherwise produced some evidence which would have resulted in acquittal. That is far different from *Mooney*.

The cornerstone of the defendant's brief is the assertion that the three-prong balancing test of *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976) is *the* test of due process on "issues as to the allocation and degree of the burden of proof." See Pet. Brief 10. This test has been invoked almost exclusively in civil cases, including *Mathews* itself and the other applications defendant cites. See *ibid*. Although amicus believes that the California statute would pass the *Mathews* test, we submit that the Court should not employ that test in this case. The use of *Mathews* for general criminal due process questions would be a disaster.

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3. See part III B, *post*, p. 15.

The *Mathews* multi-prong balancing test comes close to not being a test at all. One leading treatise has noted the "difficulty of predicting how the Supreme Court will employ the *Mathews* balancing test." 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 17.8, 267 (1986). When the outcome of a test is difficult to predict, the suspicion naturally arises that the "test" is a smokescreen for reaching a desired result. "[I]t is impossible to predict the results unless one knows the personal value systems of those doing the balancing." *Id.*, at 265. The balancing test has also been criticized as a legislative judgment to which the judiciary is ill-suited. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 30 (1976). These criticisms may not justify an overruling of *Mathews* in the areas where it has traditionally been employed, but they caution against its unnecessary extension.

Mathews arose out of the administrative state, a modern innovation with no common law heritage and no guidance in the text of the constitution. That innovation has caused its share of constitutional headaches. See, *e.g.*, Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 248 (1985). With guideposts in neither text nor tradition, perhaps an open-ended "test" such as *Mathews* is necessary. But see *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127, n. 6 (1989) (lead opn. of Scalia, J.). The criminal law, however, is precisely the opposite. The trail is blazed with copious markers in the text of the Constitution and in the centuries of Anglo-American law.

The only significant application of *Mathews* to a criminal trial appears to be *Ake* v. *Oklahoma*, 470 U. S. 68, 77 (1985).[4] That case casually recited the *Mathews* test, citing only *Mathews* itself and one other civil case. *Ibid.* Yet this adoption of

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4. In *United States* v. *Raddatz*, 447 U. S. 667 (1980), the Court "recites this test, but it does not even attempt to apply it." *Id.*, at 700 (Marshall, J., dissenting).

Mathews is fundamentally inconsistent with a host of authority in criminal cases, both earlier and later. The test calls upon the federal court to weigh the interests involved and the value of the procedure in question. *Ibid.* This is a far cry from the extremely limited scope of due process review established in *Snyder*, *Spencer*, *Dowling*, *McGuire*, and other cases. See, *e.g.*, *Lisenba* v. *California*, 314 U. S. 219, 227-229 (1941) (rejecting federal supervision of relevance and prejudice rules of evidence).

Ake could easily have reached its result without plunging the criminal law into the abyss of the nebulous *Mathews* test. *Ake* was a relatively modest extension of the preexisting rights to access to exculpatory evidence under *Brady* and to appointed, effective counsel for indigent defendants. See *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963); *Strickland* v. *Washington*, 466 U. S. 668, 700-701 (1984).

Amicus submits that the Court should disclaim any application of the boundless *Mathews* test to criminal procedure. That test would effectively declare open season on state procedures in federal courts. Due process analysis in criminal cases should be limited to the Bill of Rights, the common law supplemented by American tradition, and the procedures essential to a fair trial. Other questions of evidence and procedure are proper issues for decision by the people through the democratic process.

III. California's procedure is fundamentally fair.

A. General Principles of Evidence.

Looking at the present question, for the moment, strictly in terms of general principles of evidence, California's rule is precisely correct. The statute fixes the burden of producing evidence, the risk of nonpersuasion, and the measure of the jury's persuasion just where they should be.

The concept of burden of proof, in the sense of the risk of nonpersuasion, is not limited to legal proceedings. It arises any time two people attempt to persuade a third person. 9 J. Wigmore, *Evidence* § 2485, 285 (Chadbourn rev. 1981). If A wants M to invest money, and B does not want M to make the investment, then A has the burden of proof, because M will not invest if he is not convinced. "It is the *desire to have action taken* that is important." *Id.*, at 285-286 (emphasis in original).

Wigmore's example assumes that no action has yet been set in motion. Taking the example one step further, if M has already subscribed for stock in A's enterprise, B would have to convince M to back out, because people normally fulfill their agreements. A more general statement of the reality of "practical affairs generally," then, is that the risk of nonpersuasion falls on the person who wishes the result to be different from what it would be if the question had never come up.

This distinction is the reason why the rules of *In re Winship*, 397 U. S. 358 (1970) and *Sandstrom* v. *Montana*, 442 U. S. 510 (1979) only apply to elements of the offense and not to those external issues which provide a defense despite the truth of the elements. In *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), "malice" was an element of murder, and the burden of negating malice could not be shifted to the defendant. In *Patterson* v. *New York*, 432 U. S. 197, 206 (1977), on the other hand, the prosecution had proven all of the elements. Conviction would then follow if the issue of self-defense had never come up; the burden of proving self-defense could therefore be placed on the defendant.

In California, the prosecution initiates felony proceedings by convincing a grand jury or a magistrate that there is sufficient cause to believe that the defendant has committed a felony. See Cal. Const. art. I, § 14. From that point, trial will proceed if nothing comes up to block it. Placement of the burden of proof on whichever party seeks to derail the train conforms to the first principle of placement of the burden. See also Law Revision Commission comment to Cal. Evid. Code § 500, reprinted in 9 Wigmore, *supra*, § 2486, 288-289, n. 3.

Another consideration in the placement of the burden is whether one party has knowledge of the facts unavailable to the other party. On this point there is a strong case for placing the burden on the defendant.

The reason why an incompetent defendant cannot be tried is that the defendant's cooperation may be essential to the making of the defense. See *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975). The defendant may have an alibi, but be unable to tell counsel where he was. He may have killed in self-defense and be the only living witness, yet be unable to testify due to mental illness. These facts all relate to *past events*. The defendant's inability to testify about them or even give counsel investigative leads may put critical facts out of reach.

Present competency to stand trial is far different. The past is relevant only to the extent that it sheds light on the present. The key is whether the defendant "has sufficient *present* ability to consult *with his lawyer* . . . ." *Dusky* v. *United States*, 362 U. S. 402 (1960). This definition places defense counsel in a unique position. Counsel *personally* is the key percipient witness to the ultimate fact in issue. See Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 27 (1977). Indeed, because of the confidentiality of attorney-client conferences, members of the defense team may be the *only* witnesses to directly observe whether the defendant is able "to consult with his lawyer."

On the second prong of the *Dusky* test, rational and factual understanding, 362 U. S., at 403, the defense once again has superior access to evidence. The defense lawyer and his retained or appointed experts are "on the defendant's side" and trying to help him. If the defendant can understand that, he is more likely to cooperate with the defense than with the prosecution. If he cannot, that inability is evidence tending to prove incompetency.

The argument that incompetency renders the defendant unable to prove his incompetency is specious. Incompetency is not proven by the defendant personally. It is proven pri-

marily by the testimony of witnesses who observe the defendant's present behavior. While the jailers disposed to help the prosecution may observe a greater quantity of defendant's behavior, the defense team observes the behavior directly relevant to the competency issue. The other typical source of evidence is testimony about the defendant's childhood, usually by family members disposed to help the defense. See, *e.g.*, *Pate* v. *Robinson*, 383 U. S. 375, 378-379 (1966).

On the second general principle, then, the California rule is again correct, at least in the situation where the defendant is asserting incompetency. The defense team has superior access to the evidence, and it is fair to place the burden on them.

B. Fairness of the Rule.

Failure to distinguish between the defense team and the defendant personally is the root of two closely related and equally fallacious arguments. *Pate* v. *Robinson*, 383 U. S. 375, 385 (1966) held that a defendant whose competency has not yet been determined cannot waive his right to the determination. *United States* v. *DiGilio*, 538 F. 2d 972, 988 (CA3 1976) held that the same principle precludes presuming that the defendant has enough intelligence to produce evidence of his own incompetence. Medina makes a similar argument based on California's state nonwaiver rules. Pet. Cert. 12-13.

The common fallacy of these arguments is that the decision to waive basic rights is personal to defendant and must be understood by him, see, *e.g.*, *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), while a psychiatric examination does not require that the subject understand what is happening. Indeed, the farther out of touch with reality the subject is, the more certain the experts will be of his incompetency.

Where the magnitude of the burden is preponderance of the evidence, the placement of that burden only makes a difference "in the rare case when . . . the conflicting evidence is in equipoise in the mind of the fact finder." *DiGilio*, *supra*, 538 F. 2d, at 988. While an argument can be made that such a defendant should not be tried, this is precisely that kind of

value judgment that a government of, by, and for the people should make through the democratic process.

The *Dusky* definition of competency is phrased in binary terms.[5] Can the defendant assist counsel, yes or no? Does he understand, yes or no? Reality is not binary.[6] The difference is the same as the difference between a light bulb on a simple on/off switch and one on a variable dimmer. *Dusky* asks whether the light is on or off, when in fact it may be glowing dimly.

A defendant who may or may not be "competent" as defined in *Dusky* will typically be marginally competent. Dr. Pierce's testimony in the present case that Medina would cooperate "to the extent that he is able," J. A. 68, indicates the difficulty presented by the requirement of a yes or no answer. Psychiatrists testify as to the extent defendant is able to cooperate, and the trier of fact decides whether that extent falls on one side or the other of the *Dusky* line. Burden of proof will make a difference when the extent of impairment is borderline.

The effect of the allocation of the burden of proof is therefore not so much a risk of "error" as it is a determination of the *degree* of mental impairment which will halt the trial. It is a decision as to whether the dimly glowing bulb will be treated as on or off.

Past cases have held that the common law rule against trial of an incompetent is within the protections of the Fourteenth Amendment Due Process Clause. *Drope* v. *Missouri*, 420 U. S. 162 (1975); *Pate* v. *Robinson*, 383 U. S. 375 (1966). It does not follow, however, that every aspect of the state court's compe-

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5. California's statutory definition is essentially the same. Compare *Dusky*, *supra*, 362 U. S., at 402 with Cal. Penal Code § 1367.

6. Pizzi, *supra* p. 13, 45 U. Chi. L. Rev., at 54-55, n. 170, cites a study measuring capacity "on a scale from total incapacity to no incapacity in 13 different functions."

tency determination must thereby come under the control of the federal judiciary. The effect of California's rule is to draw the circle around the defendants classified as "incompetent" with a slightly smaller radius than is used in some other jurisdictions. A few defendants who would otherwise be considered marginally incompetent will instead be considered marginally competent. This distinction is not fundamental, and ought not be a constitutional rule.

C. Congressional Determination.

Congress is the organ of government explicitly charged with enforcement of the Fourteenth Amendment. U. S. Const. amend. XIV, § 5. A determination by Congress that a particular procedure is suitable for federal courts should therefore be particularly persuasive authority that the same procedure in a state court meets the requirements of due process.[7]

Prior to 1984, the controlling statute said nothing either way on the burden of proof. See 28 U. S. C. former § 4244, 521 (1982 ed.). In the absence of Congressional direction, federal courts placed the burden on the prosecution when the defense is asserting incompetency. *United States* v. *DiGilio*, 538 F. 2d 972, 988 (CA3 1976); *United States* v. *Makris*, 535 F. 2d 899, 906 (CA5 1976).

The 95th Congress considered a bill to reform the criminal code. Among its many other provisions, it would have revamped the statutes on competency to stand trial. The bill made this provision for the competency hearing: "*If*, after the hearing, the court finds by a preponderance of the evidence that the defendant *is* presently suffering from a mental disease or defect . . . the court shall commit the defendant to the custody of the Attorney General." S. 1437, 95th Cong., 2d Sess. § 3611(d) (1978) (emphasis added).

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7. The converse, of course, is not true. States generally have no obligation to follow the federal lead on procedure and evidence. See *Lowenfield* v. *Phelps*, 817 F. 2d 285, 294 (CA5 1987), aff'd, 484 U. S. 231 (1988).

The bill did not pass, but the language quoted drew a chilly reception from a commentator who favors defendant's position. "Moreover the proposed statute apparently intends to *reverse the present 'burden of proof' . . . .*" Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. Chi. L. Rev. 21, 65 (1977) (emphasis added).

Pizzi's interpretation is correct. The language clearly implies that an affirmative finding of incompetency is required. The committee report states simply "Subsection (d) of section 3611 provides that the court must make a determination with respect to the defendant's competency based upon a preponderance of the evidence." S. Rep. No. 95-605, 95th Cong., 1st Sess. 1031 (1977).

Congress appears to have been undeterred by the criticism. When it returned to the question of mental defenses in 1984, it copied the operative language verbatim from the earlier bill. See 18 U. S. C. § 4241(d). Even the corresponding paragraph of the committee report was copied from the earlier report. See S. Rep. No. 225, 98th Cong., 1st Sess. 236, reprinted in 1984 U. S. Code Cong. & Admin. News 3182, 3418. This change is in accord with Congress's evident intent to tighten up on mental defenses. See, *e.g.*, *id.*, at 230.

To date, the change seems to have escaped judicial notice. Pre-1984 decisions are cited as authority as though nothing had changed. See, *e.g.*, *Lowenfield*, *supra* note 7, 817 F. 2d, at 294. Nonetheless, we cite the statute for what Congress has said, not what courts have done with it. The language is clear enough on its face. The body explicitly charged with enforcement of the Fourteenth Amendment believes that placing a preponderance burden on the party asserting incompetency is valid. That determination is entitled to considerable weight.

In summary, while defendant may have a respectable *policy* argument, he has not made out a case of a violation of a *fundamental* right. "The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment." *Mu'Min* v. *Virginia*, 114 L. Ed. 2d 493, 509, 111 S. Ct. 1899, 1908 (1991).

IV. Constitutionalizing rules is undesirable and should be avoided.

From the few, simple rules of procedure which are actually in the Bill of Rights, there has been promulgated "a detailed Code of Criminal Procedure to which a new chapter is added every year." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 156 (1970). Defendant asks this Court to add yet another chapter.

Constitutional rules are generally considered to be *per se* fundamental rules, even though many are really not fundamental. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). They are, therefore, given a higher degree of protection. A different and higher standard of harmless error review applies, *Chapman* v. *California*, 386 U. S. 18, 21-44 (1967), requiring retrial for errors which were highly unlikely to have affected the outcome.

When a doubtful claim of law is made on the margins of a federal constitutional right, federal courts review that claim *de novo* on habeas corpus, with only one exception so far. See *Stone* v. *Powell*, 428 U. S. 465, 477, 481-482 (1976). While the "new rule" limitation of *Teague* v. *Lane*, 489 U. S. 288 (1989) has mitigated this effect, a large amount of relitigation must still be done on the application of old rules. See, *e.g.*, *Wright* v. *West*, pending case No. 91-542. The questions of whether a rule is "new" and whether an exception applies must also be litigated. See, *e.g.*, *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 110 S. Ct. 2822 (1990).

These additional proceedings cost time, cost money, and diminish the deterrent effect of the death penalty. While these costs must be borne to correct truly fundamental violations, they weigh against the unnecessary creation of new constitutional rights. Each new right created will inevitably create a zone of litigable uncertainty. The continuing growth of the *Miranda* rule is proof enough of that. See, *e.g.*, *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (Kennedy, J., dissenting).

The rule at issue here is one on which reasonable people can and do differ. It is not the kind of fundamental rule which justifies the extra litigation burden that comes with constitutional status.

CONCLUSION

The judgment of the Supreme Court of California should be affirmed.

Dated: January, 1992

Respectfully submitted,

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